IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-977

HUBBARD BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MELVIN H. SIEGEL
LEONARD, STREET AND DEINARD
1200 National City Bank Building
Minneapolis, Minn. 55402

FRANK U. FLETCHER
EDWARD F. KENEHAN
FLETCHER, HEALD, KENEHAN & HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Attorneys for Petitioner Hubbard Broadcasting, Inc.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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Hubbard Broadcasting, Inc., petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 22, 1977.

OPINION BELOW

The judgment of the court of appeals entered on September 22, 1977 (App., p. 114)[1] has not been published. The order of the Federal Communications Commission (App., pp. 82-113) is reported at 59 F.C.C.2d 32 (1976).

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[1] The appendices to this petition are set forth under separate cover.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1977 (App., p. 114) and this petition for certiorari is being filed within the time allowed by the Court. By order dated December 22, 1977, Mr. Chief Justice Warren Burger extended to January 6, 1977, the time within which to file a petition for writ of certiorari (No. A-529). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §307(b), is set forth in the Appendix at page 1.

QUESTION PRESENTED

The judgment of the court of appeals presents the following question:

> Whether the Federal Communications Commission, in allocating AM frequencies and in awarding licenses between mutually exclusive applications for use of the frequencies in different communities in accordance with such allocations can, under the mandate of Section 307(b) of the Communications Act, select one community or area over another, not on the basis of the greater need of one community or area, but on the basis that one radio network station was entitled to continue to enjoy comparatively equal network facilities vis-a-vis the other radio networks with which it competes.

STATEMENT OF THE CASE

This petition seeks review of a September 22, 1977, *per curiam* judgment of the United States Court of Appeals for the District of Columbia Circuit (App., p.

114) affirming a Report and Order of the Federal Communications Commission released April 30, 1976. (App., p. 82). The Report and Order, among other things, adopted an amendment to Section 73.25 of the Commission's Rules (47 C.F.R. §73.25) that will require AM broadcast station KOB, Albuquerque, New Mexico, to operate with inferior facilities, i.e., as a Class II-A station rather than as a Class I-B station, the latter status having been granted to it by the Commission in 1958 following lengthy hearings and other proceedings. *Albuquerque Broadcasting Company*, 25 F.C.C. 683 (1958).[2]

The reviewing court's judgment simply states that the "Court is in general agreement with the reasons stated in the Commission's Report and Order" and, on that basis, the court affirmed. (App., p. 115). Basically, therefore, what this Court is called upon to review is the April 30, 1976 Report and Order of the Commission, the reasoning

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[2] A Class I-A station is one which is dominant on a clear channel rendering service over a wide area, and entitled to operate alone on that channel or without interference from any other station on the same channel.

A Class I-B station is one which shares a clear channel with another Class I-B station, each of which is required to protect the other by directionalization.

A Class II-A station is one which operates on the same channel with a Class I-A station but which is required to protect the Class I-A station by directionalization, without any corresponding protection from the Class I-A station.

A primary service area is one in which the groundwave (signal following the earth's contour and therefore relatively short-distanced) is not subject to objectionable interference or objectionable fading, whereas a secondary service area is one served by a skywave signal which may be subject to intermittent variations in intensity but is not subject to objectionable interference (47 C.F.R. §73.11).

of which the court of appeals has adopted as its own.[3]

The lengthy history of this controversy may be briefly summarized. WABC is an AM radio station owned and operated by American Broadcasting Companies, Inc. ("ABC") with transmission facilities located in New York City. KOB is also an AM radio station, owned and operated by Hubbard Broadcasting, Inc., with transmission facilities in Albuquerque, New Mexico.

In 1941, the two stations were reassigned to the same frequency, 770 kHz, their former channels having become unavailable for their use under an Agreement ("NARBA") between the United States, Canada and Mexico. In March of that year, WABC (then WJZ) was authorized by the Federal Communications Commission ("the Commission") to operate on the frequency 770 kHz as a Class I-A station. In October of the same year KOB was also authorized to operate on the same frequency, albeit on a temporary basis. After a succession of Commission orders continuing KOB temporarily on 770 kHz, the court below, on ABC's appeal, directed the Commission to proceed with a full hearing to resolve the conflict between the two stations. *American Broadcasting Co., Inc. v. Federal Communications Commission et al.*, 191 F.2d 492, 501-02 (D.C. Cir. 1951).

In 1958 the Commission, following an *ad hoc* proceeding involving a contest between KOB and WABC alone, entered an order dividing the two operations on channel 770 kHz, classifying both WABC and KOB as Class I-B on that channel, and directing both to use

[3]The background of this case is set forth in the Report and Order in question (App., p. 82) and in the Commission's April 25, 1969 Notice of Proposed Rule Making (App., p. 42) which instituted the proceeding leading to the said Report and Order.

directional antennas so as to protect the other from interference within specified limitations. The Commission found that this mode of operation would give first primary service to a substantial number of people in the Southwest without corresponding loss elsewhere since those persons lost to WABC had other primary services from other stations. *Albuquerque Broadcasting Company, supra.* In 1960, the court of appeals affirmed this order, but stated that the Commission *in other proceedings* should give due consideration to WABC's claim for equality of network facilities with those of the New York AM radio stations of the Columbia Broadcasting System ("CBS") and the National Broadcasting Company ("NBC"). *American Broadcasting – Paramount Theatres, Inc. v. Federal Communications Commission,* 280 F.2d 631, 635-36 (D.C. Cir. 1960).

In the ensuing proceedings, the Commission determined that the existing classifications of the two stations should remain unchanged. In 1961, in a so-called "clear channel" proceeding involving a large number of other channels, the Commission left the CBS and NBC New York radio stations as Class I-A stations. On certain of these other channels, the Commission authorized a new Class II-A station to operate on the same channel with the existing Class I-A station. The Commission, however, employing a "broad perspective" (App., p. 65) did not require the I-A stations to directionalize because, it said, "substantial new white areas would be created in which no groundwave [primary] service would remain available from any station". (App., p. 66).

Thereafter, in 1963, the Commission, again in a specific *ad hoc* proceeding involving a contest between WABC and KOB alone, reaffirmed its 1958 decision classifying both stations as I-B, as well as the above-mentioned

findings on which that decision was based. The Commission further found that ABC had failed to meet its burden of proving that its competitive position over the country as a whole would be adversely affected. *Hubbard Broadcasting, Inc.*, 35 F.C.C. 36 (1963).

In 1965, the court of appeals reversed, pointing out that the Commission had failed to give "adequate public interest reasons" for continuing WABC in a position of inequality of network facilities as compared with the competing New York stations of CBS and NBC. Accordingly, it directed the Commission as a possible solution to determine first whether the Commission's decision in 1958 as to the needs of the areas served by KOB in the Southwest had changed so that KOB could, consistent with the public interest, be reclassified as a II-A station, or, alternatively, to consider placing the ABC, CBS and NBC New York stations on a parity by classifying the CBS and NBC New York stations as Class I-B's. *American Broadcasting Company – Paramount Theatres, Inc. v. Federal Communications Commission*, 345 F.2d 954, 958, 960 (D.C. Cir. 1965), *cert. den.* 383 U.S. 906 (1966).

In subsequent proceedings, the Commission, first in its Notice of Proposed Rule Making, April 25, 1969 (App., p. 78) and then in its Report and Order of April 30, 1976 (App., p. 108) determined that KOB should be changed to a II-A station.

The criteria used by the Commission in making this determination differed markedly from that which it had used in its 1958 order, reaffirmed in 1963, classifying both WABC and KOB as Class I-B stations. In its 1958 order, the Commission weighed the needs of the area served by KOB in the Southwest as compared with the needs served by WABC in the East, and found that the I-B

classification for both stations was required in order to provide a first primary service to over 118,000 persons in the Southwest who would not otherwise receive any primary service and that the service that would be lost to WABC would be supplied by other stations if WABC were classified I-B. The result, as the Commission subsequently more fully explained, was to:

> ". . . permit simultaneous full-time operation by radio stations KOB, in Albuquerque, New Mexico and WABC in New York on the same frequency (770 kHz), with the same power (50 kw), but requiring each station to afford a measure of protection to the other during nighttime hours through the installation of directional antenna systems. *Albuquerque Broadcasting Company*, 25 F.C.C. 683. *The Commission's objective was to provide an additional nighttime radio signal to the comparatively underserved southwestern part of the country.* This was done by enlarging the KOB nighttime service area and curtailing that of WABC, the so-called 'flagship' station of the ABC radio network, which has previously operated without a directional antenna as the dominant 'clear channel' station on 770 kc. The Commission found that enlarged nighttime operation by KOB would better serve the public interest because it would provide a first primary nighttime service to approximately 119,000 persons and a secondary nighttime service to approximately 3,000,000 persons lacking adequate secondary service. *It concluded that these services in the southwest outweighed the much larger losses of WABC nighttime service in the east* through WABC's directionalization (a loss of primary service to some 700,000 persons and secondary service to approximately 17,000,000 persons) *because all persons losing WABC's nighttime service had other primary*

service and abundant secondary service. Technically, the result of the Commission's action was to give KOB a Class I-B license." (Footnote omitted)[4]

However, in its later Notice of Proposed Rule Making in 1969 and in its Report and Order of 1976, the Commission concluded that it could not apply the same criteria consistently with preserving a position of equality of WABC with the CBS and NBC radio stations notwithstanding the unserved needs for primary AM service provided by KOB. As to this, the Commission acknowledged that its present determination ". . . varies from conclusions reached earlier as to the need for improved AM nighttime primary and secondary service in the Southwest, a need which, as far as an AM service alone is concerned, does not appear to have changed substantially since the earlier KOB decision. . ." (App., p. 78). The Commission, moreover, declined to achieve network equality by placing all three New York stations in a Class I-B status because "such a directionalization by all three New York Class I-A stations would result in very extensive losses of service in the densely populated northeastern part of the country," where " 'white areas' *might* result if the service of all three stations were lost." (App., pp. 67, 99) (emphasis added).[5] Accordingly, the Commission concluded that ". . . a 'II-A' status for KOB will not disserve the public interest." (App., p. 109).

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[4] Federal Communications Commission, Petition for Writ of Certiorari, Supreme Court of the United States, Case No. 397, October Term, 1965, at 3-4. (emphasis added). As shown more fully below, the Commission's controlling consideration was the addition of "*first primary service*" to more than 100,000 persons in the Southwest, *see* pp. 11-12, *infra.*

[5] A "white area" in accepted usage means an area that receives no primary service.

REASONS FOR GRANTING THE WRIT

1. THE COMMISSION'S ORDER, AFFIRMED BY THE COURT BELOW, PRESENTS AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION OF SECTION 307(b) OF THE FEDERAL COMMUNICATIONS ACT WHICH WAS RESOLVED BELOW IN A MANNER IN CONFLICT WITH THE AVOWED PURPOSE OF CONGRESS.

Section 307(b) of the Federal Communications Act (47 U.S.C. §307(b)) requires the Commission to make such allocations of broadcast facilities

> "among the several States and Communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."

The avowed purpose of Section 307(b) was to avoid concentration of facilities in the heavily populated areas and thus assure service to the "sparsely populated" areas. This policy of wide dispersion of transmission facilities dictated the Commission's original decision to make both KOB and WABC Class I-B stations. The Commission's present order radically alters this policy. The Commission now applies this policy only if the competing network facilities, typically located in the more populated areas, are placed in a position of relative equality. It thus defeats the avowed purpose of Congress to assure adequate service to sparsely populated areas.

a. A primary purpose of Section 307(b) was to assure service to the sparsely populated areas. The critical language of Section 307(b) quoted above was originally included in Section 9(b) of the Radio Act of 1927. 44 Stat. 1162 (1927). Fears had even then been expressed that this language would be insufficient to secure facilities for the sparsely populated areas, partic-

ularly because of the omission from the bill emerging from conference of a requirement that "due consideration of the right to each state to have allocated to it or to some [entity] within it, the use of a wave length." 68 Cong. Rec. 2557 (1927).

Within a year these fears were realized in practice. Noticeable deficiencies in services were found in portions of the South and West; stations were concentrated in the North and East. To correct this deficiency, the so-called Davis amendment was enacted in 1928. Act of March 28, 1928, 45 Stat. 373. It required the licensing authority to make an equal allocation of broadcasting facilities among five zones and an equitable distribution of such facilities among the states within each zone according to population. In explanation, Congressman McKeown stated (69 Cong. Rec. 4489 (1928)):

> "The Commission has construed an equitable distribution to mean from the standpoint of the listener. If he can have a receiver in Arizona that can hear New York, that is enough for him, and they say that is a fair and equitable distribution . . . We are asking to pass this legislation [referring to the Davis amendment] so that the Commission will not do as it has in the past, ignore all the rest of the country and let the few stations in New York and Chicago dominate the whole broadcasting country."

The Davis amendment was carried forward in Section 307(b) of the Communications Act of 1934, as originally enacted. Unfortunately, the mechanical formula thereby imposed actually resulted in "concentration of the use of frequencies in centers of population, and the restriction of facilities in sparsely populated states." H.R. Rep. No. 2589, 74th Cong., 2d Sess. 3 (1938).

As a result, the Congress in 1935 repealed the Davis

amendment and substituted the present Section 307(b). The effect was to restore the language contained in the original Section 9(b) of the Radio Act of 1927, but with the avowed purpose of eliminating the unworkable quota system and of allowing "sparsely populated" areas, especially in the West and Midwest, to "secur[e] the facilities we ought to have to meet the demands of that section of the country." 80 Cong. Rec. 6032 (1936); H.R. No. 2589, *supra* at 3. *See Pasadena Broadcasting Co. v. Federal Communications Commission,* 555 F.2d 1046, 1050 (D.C. Cir. 1977).

b. To carry out the mandate of Section 307(b), the Commission "held in numerous decisions and pronouncements that one of its most important obligations in carrying out this mandate through the allocation of broadcast facilities is to provide a *first primary service* to all the populations of this country, to the extent that it is possi- to do so," as the Commission stated in *Albuquerque Broadcasting Co., supra.* There the Commission cited as illustrative *WJIM, Inc.*, 12 F.C.C. 406 (1947), *aff'd sub nom. Radio Cincinnati, Inc. v. Federal Communications Commission,* 177 F.2d 92 (D.C. Cir. 1949) where the community found to have the greater need was one which would be provided a *first* primary nighttime service to a population of only 5,000, in preference to a community which would receive *additional* primary service for more than 1,250,000 persons.

c. This priority dictated the decision of the Commission, made originally in *Albuquerque Broadcasting Co., supra,* in 1958, and reaffirmed in 1963 in *Hubbard Broadcasting Inc., supra,* to place both KOB and WABC on 770 kHz as Class I-B stations. The Commission in so doing stressed its mentioned obligation "to provide a *first primary service* to all the populations of this country," as

applied in *WJIM, Inc., supra. See* 25 F.C.C. at 779. Applying this test, the Commission found that this mode of operation "would bring the only primary service nighttime to more than 100,000 persons who would not receive it" otherwise, while "the curtailment of the service of WABC" itself, albeit involving a much larger population, "would not cause any loss whatsoever of primary service to those persons" losing WABC service, since primary service was available to them from other stations, including stations affiliated with ABC and other networks. *Id.*

d. The present order of the Commission affirmed below makes a radical change in the application of Section 307(b). Now, contrary to its previous "numerous decisions and pronouncements," the Commission will no longer give first priority to providing a "first primary service to all of the populations of this country," unless it also finds that competing network facilities will remain in a position of relative equality, and this though the effect is to subordinate the needs of the sparsely populated Southwest areas to those of the heavily populated areas of the East.

The Commission, moreover, left no doubt that its new policy extended to the facilities of the three major networks wherever located. The Commission stressed as its own policy that "network service is of high importance" (App., p. 69) and hence concluded that it should look at the situation in a more general sense, "involving not only the New York stations of the three major networks" but "ABC as one of three network companies owning radio facilities in the country's largest market as well as in other places, and the desirability of putting these facilities on an equal footing." (App. pp. 106, 107).

In applying these requirements, the Commission gave preference to the needs of the "densely populated" areas of the East over the smaller population of the Southwest. (App., pp. 67, 77, 99). As noted above, the court of appeals had left to the Commission, as one alternative, to make a "new assessment of the public interest needs of the Southwest" (App., p. 71) and the Commission concluded that "as far as AM service is concerned, the needs in the area have not substantially lessened since 1958". (App., pp. 71, 75). But while the Commission found "considerable merit in the concept of assigning class I-B operations" to KOB and WABC, it did not consider itself free to make this choice unless it also required the CBS and NBC stations in New York to directionalize as the court of appeals had suggested as a second alternative. (App., p. 108). The Commission rejected this alternative lest the needs of the East be sacrificed to those of the Southwest. Applying the "broad perspective" it had used in connection with other clear channels (App., p. 65), the Commission stated that, as a primary service, " 'white areas' *might* result" (App., p. 67) (emphasis added) in the "densely populated northeastern part of the country" if "the service of all three stations were lost" (App., p. 99) with "at most a gain in service in the Southwest (to a population that is not extremely large). . .". (App., p. 77).[6]

The Commission's new policy is one of manifest im-

[6]Similarly, the Commission stated that the needs of the Southwest area for AM service may have been somewhat reduced by the establishment of FM stations now serving 25% of the area of New Mexico, without making any finding as to the extent to which such FM service merely duplicated the existing AM service of KOB or how many persons would receive such FM service from among those who would be lost to KOB if reclassified as a II-A station. (App., pp. 102-03).

portance. As applied to the cities of the largest population, in which the major networks own their own radio stations, it means that preference must now be given to the heavily populated areas, "precisely the result Congress meant to forestall by means of Section 307(b)". *See Pasadena Broadcasting Company v. Federal Communications Commission, supra* at 1050. Even in those areas in which the network stations are affiliated by agreement and not by ownership, priority of unserved need as among the communities or areas to be served can no longer be applied as the touchstone of choice but must yield to the controlling consideration of preservation of equality of network facilities.

e. The Commission's references to WABC as the "flagship" station of ABC (*see e.g.*, App., pp. 88, 104-06) only serve to emphasize the importance of the question of statutory construction presented. Without dispute, WABC carries "network" material during less than 10% of its composite week, and thus serves principally as a "local New York City station for the benefit of New York advertisers". (App., p. 95). Petitioner's claim that the balance of WABC's programming consists of "rock and roll" and "disc jockey chatter" (App., pp. 24, 58) is nowhere contradicted by the Commission's findings. (App., pp. 95, 96). Yet the Commission concluded that WABC's "small amount" of "network programs" (App., p. 107) was still a "valid" reason for applying the network "concept" to place ABC radio facilities on an "equal footing" with those of CBS and NBC. (App., p. 106).

Nothing could more graphically illustrate the radical change made by the Commission in the application of Section 307(b), subordinating as it does, and on such tenuous grounds, the needs of the sparsely populated

areas in disregard of the avowed purpose of Congress in enacting Section 307(b).

2. THE ORDER OF THE COMMISSION AS AFFIRMED BY THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *FEDERAL COMMUNICATIONS COMMISSION v. ALLENTOWN BROADCASTING CORPORATION*

In *Federal Communications Commission v. Allentown Broadcasting Corporation*, 349 U.S. 361 (1955), this Court approved the Commission's then-established test for applying Section 307(b) that

> "[w]hen mutually exclusive applicants seek authority to serve different communities, the Commission first determines which community has the greatest need for additional services and then determine[s] which applicant can best serve that community's need."

Save in this proceeding, the rule in *Allentown* has ever since been regarded as controlling in the application of Section 307(b). *See Pasadena Broadcasting Company v. Federal Communications Commission, supra* at 1050.

In *Allentown*, this Court held that when the Commission has determined that one community's needs are greater than another's and those needs can best be served by one applicant, the Commission cannot award the permit to another applicant simply because that other applicant is better qualified to render radio service to *another* community. Here the Commission, in an order approved by the court below, has added still another basic criterion which would permit the Commission to sacrifice the unserved needs of a community in order to establish competitive equality in another area among the three major networks. So radical a change from the

rule in *Allentown*, we respectfully submit, should not be sanctioned without the approval of this Court.

CONCLUSION

The matter in controversy has had an unduly protracted history. Understandably, the Commission may no longer have a clear recollection of the deliberations of Congress, extending over almost a decade from 1927 to 1936, which defined the basic objectives of the present Section 307(b) of the Communications Act – or the rule in *Allentown*, approved by this Court in 1955, which effectuates the Congressional intent. But the Congressional mandate to secure broadcast service for the sparsely populated areas stands unchanged and, unless and until changed by Congress, must govern this and all other allocations of broadcast facilities under Section 307(b).

FOR THE FOREGOING REASONS, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

MELVIN H. SIEGEL

LEONARD, STREET
AND DEINARD
1200 National City
Bank Building
Minneapolis, Minn. 55402

FRANK U. FLETCHER
EDWARD F. KENEHAN

FLETCHER, HEALD, KENEHAN
& HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Attorneys for Petitioner
Hubbard Broadcasting, Inc.

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PETITIONER'S APPENDIX

FRANK U. FLETCHER
ROBERT L. HEALD
EDWARD F. KENEHAN
JAMES P. RILEY

FLETCHER, HEALD, KENEHAN
& HILDRETH
1225 Connecticut Ave., N.W.
Suite 400
Washington, D.C. 20036

Attorneys for Petitioner,
Hubbard Broadcasting, Inc.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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APPENDIX A

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §151 *et seq.*

§303. Powers and duties of Commission

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall–

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

* * * * *

§307. Licenses; allocation of facilities; terms; renewals

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * *

APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 66-286

In re Applications of	)	Docket No.
	)	6584
HUBBARD BROADCASTING, INC. (KOB),	)	
Albuquerque, New Mexico	)	File No.
For Modification of	)	BMP-1738
Construction Permit	)	
AMERICAN BROADCASTING-PARAMOUNT	)	Docket No.
THEATRES, INC. (WABC and	)	14225
Auxiliaries)	)	
New York, New York	)	File No.
For Renewal of	)	BR-167
Existing License	)	
In the Matter of	)	Docket No.
CLEAR CHANNEL BROADCASTING IN THE	)	6741
STANDARD BROADCAST BAND	)	

ORDER

By the Commission: Commissioner Loevinger absent.

At a session of the Federal Communications Commission held at its offices in Washington, D.C. on the 6th day of April, 1966;

The Commission having under consideration (1) the February 25, 1965 decision of the United States Court of Appeals for the District of Columbia Circuit in *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, et al.*, 120 U.S. App. D.C. 264, 345 F.2d 954, remanding this case to the Commission for further proceedings not inconsistent with its opinion; (2) the Commission's Memorandum Opinion and Order adopted July 14, 1965, reopening the record herein and designating the above-captioned applications for further hearing; and (3) a motion filed on August 9, 1965, by American Broadcasting-Paramount Theatres, Inc., requesting that the time requirements contained in the Commission's procedural rules be suspended until the conditional character of the procedures proposed by the Commission is eliminated (together with supporting comments filed on August 11, 1965, by Hubbard Broadcasting, Inc. (KOB));

IT APPEARING that the order of designation of July 14, 1965 stated, among other things, that hearing on the specified issues would be held in abeyance pending a judicial determination with respect to a petition for clarification of the Court's decision and would proceed only in the event such a course appeared feasible in light of the Court's ruling thereon;

IT FURTHER APPEARING that the petition for clarification was denied by order of the Court on November 24, 1965, and that accordingly the Commission does not believe that it can appropriately go forward with the procedures set forth in the hearing order;[1]

IT IS ORDERED, That the aforementioned July 14, 1965 Memorandum Opinion and Order of the Commission IS HEREBY VACATED;

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[1] In addition, the order of designation noted that a writ of certiorari would be sought in the Supreme Court should the Court of Appeals not approve the procedures prescribed in the designation order. On February 21, 1966 the Supreme Court denied the petition for certiorari.

IT IS FURTHER ORDERED [sic], That within thirty days Hubbard Broadcasting, Inc., American Broadcasting-Paramount Theatres, Inc., and the Broadcast Bureau are directed to submit memoranda setting forth their views as to what further steps should be taken to implement the Court's mandate; and that replies to these memoranda may be filed within fifteen days thereafter;

IT IS FURTHER ORDERED, That the Motion to suspend time requirements filed August 9, 1965, by American Broadcasting-Paramount Theatres, Inc., IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: April 7, 1966

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	DOCKET NO.
	)	6584
HUBBARD BROADCASTING, INC.	)	
(KOB)	)	
Albuquerque, New Mexico	)	FILE NO.
	)	BMP-1738
For Modification of Construction	)	
Permit	)	
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.	)	DOCKET NO.
	)	14225
(WABC AND AUXILIARIES)	)	
New York, New York	)	FILE NO.
	)	BR-167
For Renewal of Existing License	)	
In the Matter of	)	
CLEAR CHANNEL BROADCASTING IN THE STANDARD BROADCAST BAND	)	DOCKET NO.
	)	6741

To: The Commission

MEMORANDUM OF VIEWS

This memorandum is submitted on behalf of Hubbard Broadcasting, Inc., in response to the Commission's Order of April 6, 1966, vacating its Memorandum Opinion and Order of July 14, 1965, in re the above-captioned matters and requesting the views

of Hubbard Broadcasting, Inc., American Broadcasting Companies, Inc. (formerly American-Broadcasting-Paramount Theatres, Inc.), and the Broadcast Bureau as to the further steps to be taken to implement the mandate of the U.S. Court of Appeals for the District of Columbia Circuit in *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, et al,* 120 U.S. App. D.C. 264, 345 F.2d 954 (1965).

Background Statement

The background and history of this litigation, insofar as it is pertinent to the current problem, may be summarized chronologically as follows:

1. *March 29, 1941.* – The first North American Regional Broadcasting Agreement became effective. Prior thereto, Station KOB, Albuquerque, New Mexico, had operated on the frequency 1180 kc as a clear channel station, the Commission, as of May 7, 1940, having granted KOB a construction permit for a 50 kw, non-directional operation. However, the 1941 NARBA agreement withdrew the frequency 1030 kc with 10 kw power with the understanding that "the question as to which frequency should be permanently assigned . . . be deferred until an appropriate application presents that issue."

2. *June 3, 1941.* – KOB was granted a special temporary authorization to operate with 50 kw power on the frequency 1030 kc. Later, on October 14, 1941, the Commission, on its own motion, modified the SSA to provide for operation on the frequency 770 kc in lieu of the 1030 kc.[1]

[1]Considerable litigation not referred to in this memorandum followed with respect to KOB's operation pursuant to the SSA.

3. *February 3, 1944.* – KOB, after further consultation with the Commission, filed applications to modify its construction permit (File No. BMP-1738) and license (File No. BL-1799)[2] to specify the frequency 770 kc on which it was then operating pursuant to the special service authorization. The applications sought regularly licensed operation on 770 kc, 50 kw power, with directional operation on both WJZ (WABC) and KOB if and to the extent the Commission found mutual protection necessary. In connection with the filing of these applications, KOB petitioned the Commission to grant an exception to, or to amend, its rules.[3] The applications and the petition were filed for the purpose of enabling the Commission to initiate a proceeding in which the KOB-WABC problem could be brought into focus and a decision reached with respect to a permanent frequency for KOB.

4. *May 9, 1944.* – The two KOB applications were designated for hearing (Docket Nos. 6584 and 6585).

5. *January 2-12, 1945.* – The first hearings were held on the two applications with one of the issues being "to determine whether Section 3.25 of the

[2]The "license to cover" application was accompanied by a request for authority to determine operating power by direct measurement (File No. BZ-1583). It was later dismissed and is no longer involved in this litigation.

[3]At that time the Commission's Rules (Section 1.72) provided that "applications which are not in accordance with the Commission's rules, regulations, or other requirements will be considered defective unless accompanied either (1) by a petition . . . to amend any rule or regulation with which the application is in conflict, or (2) by a request of the applicant for waiver of, or exception to, any rule, regulation or requirement with which the application is in conflict." The current rule in this regard is Section 1.566.

Commission's Rules should be amended so as to permit the operation of Station KOB as proposed in application B5-MP-1738."

6. *February 20, 1945.* – The Commission instituted the clear channel proceeding (Docket No. 6741), placing in issue the classification of all the clear channels. Both KOB and WABC participated in this proceeding.

7. *August 9, 1946.* – The KOB applications were placed in the pending file to await a decision in the clear channel proceeding.

8. *September 30, 1952.* – The Commission removed the KOB applications from the pending file.

9. *May 26, 1955.* – The record in Dockets 6584 and 6585 was reopened to bring up to date the evidence on the existing issues and to adduce evidence on additional issues.

10. *September 3, 1958.* – The Commission, following evidentiary hearings in 1956 and 1957, adopted an order amending Section 73.25(a) of its Rules to provide that "On the frequency 770 kc two Class I stations may be assigned." The reasons for adopting this amendment were set forth in a decision (*Albuquerque Broadcasting Co., et al,* Docket Nos. 6584 and 6585, 16 Pike & Fischer RR 765) which also ordered that:

> "... Albuquerque Broadcasting Company is granted leave to amend its application (File No. BMP-1738) for modification of construction permit to specify nighttime operation of Station KOB, Albuquerque, New Mexico, on the frequency 770 kc, with power of 50 kilowatts, employing a directional antenna with the parameters specified in Paragraph 22 of the Findings of Fact, supra;

> American Broadcasting-Paramount Theatres, Inc., is granted leave to file an application for authority to make changes in the operation of Station WABC, New York, New York, on 770 kilocycles, to specify nighttime operation, employing a directional antenna with the parameters specified in Paragraph 22 of the Findings of Fact, supra; American Broadcasting-Paramount Theatres, Inc., is directed to file its application for renewal of license (File No. BR-167), expiring June 1, 1960, of Station WABC, New York, New York, not later than July 1, 1959; ..."

11. *March 27, 1959.* – The Commission accepted for filing an amendment to the KOB application for modification of construction permit (BMP-1738) conforming to the September 3, 1958, decision.

12. *October 8, 1959.* – The WABC renewal application was filed as directed by the September 3, 1958, decision. WABC has never filed an application for authority to operate directionally pursuant to the September 3, 1958, decision.

13. *February 23, 1960.* – Hubbard (then KSTP, Inc.) filed an application for a construction permit for a new AM station in New York to operate on the frequency 770 kc with 50 kw of power and employing a directional antenna at night. This application (File No. BP-13932), which is still pending, requests the frequency presently utilized by WABC in New York City and is mutually exclusive with the pending application for renewal of that station's license.[4]

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[4]On July 11, 1961, the Commission issued a public notice (FCC 61-866), pursuant to Sections 1.354(c), 1.106(b)(1), and 1.361(b) of its Rules, stating that as of August 14, 1961, Hubbard's New York application would be ready and available

[footnote continued]

Hubbard's New York application also conforms to the September 3, 1958, decision.

14. *May 27, 1960.* – The September 3, 1958, actions of the Commission were affirmed by the Court of Appeals. *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission,* 108 U.S. App. D.C. 83, 280 F.2d 631 (1960).[5] There were no

for processing and only competing applications on file by that date would be entitled to be consolidated for hearing with that application.

[5]After concluding that the Commission could confine its consideration to two frequencies—770 and 1030—and had not erred in assigning KOB to 770 kc rather than 1030 kc, the Court went on to say:

> "At the same time, we do not think that the position of ABC as a network should be permanently prejudiced by forcing it to share a channel if other networks are given full use of clear channels. This inequity, if it exists or is permitted to exist, should be cognizable by the Commission in a proper proceeding brought before it by ABC, even though the assignment of KOB to 770 kc is permitted to continue. In other words, the Commission should seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks. Whether this is to be done by permitting ABC to intervene in the clear channel proceedings now pending, or through some other means, is not for us to say. It may be that ABC can raise its claims in this regard by filing competitive applications when present licensees on other frequencies seek renewal or by seeking modification of existing licenses held by others. Perhaps the Commission will afford, sua sponte, some other procedural remedy. Thus, we do not believe ABC has been or should be precluded from a hearing on its claim that the public interest requires that the loss of service in the East, which Class I broadcasting from Albuquerque produces, be absorbed by some eastern broadcaster other than WABC. Any failure by the Commission to give due consideration to ABC's claims for treatment comparable to that accorded to other networks, when raised in an appropriate manner, may be brought to the courts for review."

further proceedings, i.e., petitions for rehearing or certiorari, and the amendment to Section 73.25 therefore became final.

15. *August 22, 1960.* – The Commission addressed a letter to Hubbard and ABC pursuant to the then applicable Section 309(c) of the Communications Act. This letter advised, among other things, that Hubbard's New York application for the facilities of Station WABC and the WABC renewal application were mutually exclusive and would be designated for hearing. No mention was made of Hubbard's application for modification of the KOB construction permit in the August 22, 1960, letter.

16. *September 19, 1960.* – Hubbard filed a petition with the Commission pointing out that the KOB modification application was also mutually exclusive with the WABC renewal application and requested that the three applications, the KOB modification, the WABC renewal and Hubbard's New York application, be consolidated for hearing in the same proceeding.

17. *August 4, 1961.* – The Commission released a Memorandum Opinion and Order designating the KOB modification application and the WABC renewal application (see 11 and 12 above) for hearing in a consolidated proceeding to determine, in view of the statement of the Court of Appeals quoted in footnote 5 above, "... whether the consideration of providing facilities to the ABC Network in New York on a basis which is fair and equitable in comparison with other radio networks should vary the conclusion ..." reached by the Commission in its September 3, 1958, decision with respect to the use of the frequency 770 kc. The same Memorandum Opinion and Order denied Hubbard's September 19, 1960, petition to consolidate

insofar as it requested that Hubbard's New York City application be designated for hearing in the same consolidated proceeding because of its mutual exclusivity with the WABC renewal application. Instead of so designating Hubbard's New York City application, the Commission ordered that further action on it be withheld.

18. *September 14, 1961.* – The Commission released its Report and Order in the clear channel proceeding (Docket No. 6741), "affirming" its September 3, 1958, order amending Section 73.25 of the Rules to permit two Class I stations to operate on the frequency 770 kc and further amending Section 73.25 to permit one Class II-A station (see also Section 73.22) to operate on each of eleven other clear channels, including 880 kc, the frequency assigned to Columbia Broadcasting System's New York City station, but not 660 kc, the frequency assigned to National Broadcasting Company's New York City station.

19. *November 28, 1962.* – The Commission released a Report and Order in Docket No. 6741 denying numerous petitions for reconsideration of the September 14, 1961, clear channel decision, including a petition on behalf of WABC. Among other things, the WABC petition reiterated its contention that it should be permitted to show the advantages of using 660, 880, or 1180 kc for KOB rather than 770 kc.

20. *January 25, 1963.* – ABC petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's actions of September 14, 1961 (18 above), and November 28, 1962 (19 above). The petition also requested review of "the concurrently taken action of the Commission

amending Rule 3.25 to permit the assignment of 'two Class I stations' on the frequency 770 kc . . ." In the latter connection, WABC apparently was suggesting that the 770 kc breakdown was an action concurrent with the action of September 14, 1961, breaking down other clear channels to permit Class II-A stations to operate thereon. Actually, however, the action having to do with the 770 kc amendment was taken on September 3, 1958, became final when the Court affirmed in its 1960 decision, and, therefore, was not subject to review in 1963.

21. *July 8, 1963.* – The Commission released its decision in re the KOB modification application (Docket No. 6584) and the WABC renewal application (Docket No. 14225) wherein it concluded that ABC had not shown that it, as a network, would be prejudiced by requiring WABC to directionalize nighttime and ordered as follows:

> That the application of Hubbard Broadcasting, Inc. for modification of construction permit of Station KOB, Albuquerque, New Mexico, IS GRANTED: and that the application of American Broadcasting-Paramount Theatres, Inc., for renewal of license of Station WABC, New York, New York, IS DENIED, without prejudice to reconsideration if ABC files, within 30 days of the release date hereof, an application for modification of facilities on the frequency 770 kc in conformity with the parameters specified in paragraph 22 of the September, 1958, decision herein (25 FCC 683, 16 RR 765).

22. *August 7, 1963.* – ABC and Hubbard each filed a notice of appeal with the United States Court of

Appeals for the District of Columbia Circuit (Case Nos. 18,046 and 18,045, respectively).[6]

23. *August 30, 1963.* – The Court consolidated Case No. 17,567, WABC's petition for review of the clear channel decision (see 20 above) with the August 7 appeals (Case Nos. 18,046 and 18,045).

24. *February 25, 1965.* – The Court released its decision in connection with the foregoing cases and remanded the ABC cases (Nos. 17,567 and 18,045) to the Commission for further proceedings.

The 1960 and 1965 Court Decisions

As indicated above, the captioned KOB application for modification of construction permit was filed in 1944, along with a petition for amendment of Section 73.25 of the Rules, for the purpose of providing a procedural vehicle for finding a permanent frequency for Station KOB. Following extensive evidentiary hearings, the Commission, on September 3, 1958, adopted an order amending that Section so as to permit two Class I stations to operate on the frequency 770 kc. The Commission also indicated with specificity the modes of operation for the two stations—one, in Albuquerque, New Mexico (KOB), and the other in New York City (WABC). The 1960 decision of the Court of Appeals affirmed these determinations but added a caveat that, because it was required to share its channel with KOB, ABC should be afforded an opportunity in an appropriate proceeding to seek and obtain "channel facilities . . . on a basis which is fair

[6]Hubbard subsequently filed a petition for review with the Court (Case No. 18,078).

and equitable in comparison with other networks." (280 F.2d at 635)

Following the 1960 Court decision, the Commission concluded its clear channel proceeding, issuing a final Report and Order on November 28, 1962, and, after conducting a special hearing on the KOB modification and WABC renewal applications, concluded that, since a directionalized nighttime operation by WABC as provided in the September 3, 1958, decision would not adversely affect the competitive position of the ABC radio network, there was no need to alter the result of its 1958 decision.

ABC appealed from, or petitioned for review of, both of these decisions, and the Court ruled that neither satisfied the caveat to its 1960 opinion, i.e., that ABC, having been required to accommodate KOB as a I-B station on its channel, should be provided, *in some other appropriate proceeding,* comparable channel facilities vis-a-vis the other networks.

More specifically, the 1965 Court decision directed the Commission to first reassess the need for a Class I-B facility at Albuquerque, New Mexico, in the light of present conditions and the availability of possible additional service from new Class II-A stations, pointing out that perhaps a Class II-A facility might now satisfy the needs of the Albuquerque area. However, the clear impact of the 1965 decision is that if, after a reassessment, the Commission concludes that a Class I-B facility is still required to serve the Albuquerque needs, then that facility would operate on the frequency 770 kc as provided by the Commission's 1958 decision. In other words, as Hubbard interprets the 1965 decision, the Court has left the 1958 amendment to Section 73.25 of the Rules undisturbed but subject to

reamendment if service needs can now be satisfied by an allocation arrangement for 770 kc such as the clear channel decision provided for 660 kc and 880 kc.

If, however, the reassessment shows that a Class I-B facility is still required at Albuquerque, the Commission, in view of its decision in the clear channel case resulting in a Class I-A undirectionalized status for CBS and NBC flagship stations, must give ABC "the opportunity for a hearing as to whether one or more of the other clear channels should accommodate two Class I-B stations, to the end that comparatively equal channel facilities may be provided for the flagship stations of the three networks in the manner most favorable to the public interest." *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, et al*, 345 F.2d 954, 960 (1965).

What the Court held in 1965 is that ABC is entitled, in a rule making proceeding, to seek channel facilities on a comparable basis with the other networks with which it competes if, because of public interest considerations (as in this situation), it suffers a loss of facilities. The Court has not held that the *ad hoc* proceeding concluded on September 3, 1958, and resulting in the 770 kc amendment to Section 73.25 of the Rules was unlawful or improper in any respect or that the amendment should be set aside, vacated, or suspended. In fact, the Court, in 1960, expressly approved of both the proceeding and the amendment, and its 1965 opinion is not to the contrary. The 1965 opinion does recognize that the approach followed in the 770 kc *ad hoc* proceeding was not entirely consistent with that followed in the clear channel proceeding, but it does not question the validity of either the approach followed or the result reached in the Commission's September 3, 1958, decision.

Except for the time involved, and the greater complications that ensued, the 770 kc *ad hoc* breakdown proceeding was not unlike the one which resulted in the reclassification of the frequency 850 kilocycles from I-A to I-B (by amending Section 3.25 of the Rules) following ratification of the same 1941 NARBA. See *Federal Communications Commission v. National Broadcasting Company (KOA)*, 319 U.S. 239, 87 L. Ed. 1374 (1943) and *Matheson Radio Co., Inc. (WHDH)*, 10 F.C.C. 128 (1943). While the Supreme Court held that the amendment of Section 3.25 ("breaking down" 850 kc on which KOA was licensed to operate) constituted a modification of KOA's license, and that KOA was entitled to be heard for that reason, no question was raised as to the propriety of precisely the same sort of an *ad hoc* approach followed by the Commission in "breaking down" 770 kc to accommodate two Class I stations.

Much more recently the Court of Appeals, *en banc*, rendered an opinion which decisively recognizes the propriety of *ad hoc* amendments to the Commission's rules in cases such as this, even during the pendency of a general rule making proceeding, the results of which obviously could be conflicting with the *ad hoc* amendment.

In *Van Curler Broadcasting Corp. v. United States et al*, 98 U.S. App. D.C. 432, 236 F.2d 727 (1956), *cert. denied* 352 U.S. 935 (1956), the question before the Court was the validity of the Commission's rule making action amending Section 3.606 of the Rules (Table of Television Assignments) to add VHF television Channel 10 to Vail Mills, New York. Prior to the effective date of this amendment (December 16, 1955), the Commission, on November 10, 1955, instituted a general rule

making proceeding, comparable to the clear channel proceeding, to consider possible overall solutions to the television allocation and assignment problem on a broad nation-wide basis (Docket No. 11,532, FCC 55-1124). In view of the state of the record at that time, it was not unreasonable to expect that the solution to the television allocation problem in the Vail Mills vicinity (Albany-Schenectady-Troy) might very well be to amend Section 3.606 of the Rules in a manner inconsistent with the use of Channel 10 in that area. In fact, before the Court rendered its decision in the case, the Commission, to implement conclusions reached in the general proceeding (Docket No. 11,532), issued a Notice of Proposed Rule Making (Docket No. 11,751, FCC 56-592) looking to the addition of UHF Channel 45 to the Albany-Schenectady-Troy area instead of VHF Channel 10 to Vail Mills. Nevertheless, the Court (*en banc*), with notice of the Commission's change in position, affirmed the amendment to Section 3.606 stating as follows: (98 U.S. App. D.C. at 434, 435, 236 F.2d at 729, 730)

> "Since the Commission did not summarily depart from established principles or program, but on the contrary followed a course clearly anticipated and provided in its basic Sixth Report, its action can in no sense be deemed arbitrary or capricious. Since all procedural requirements as to rule-making proceedings were met, no defect in the order appears in that respect. The conclusion reached by the Commission is clearly stated. The basis and purpose of the order are ample and understandably, even though succintly, stated and are within the considerations prescribed by the statute as criteria for Commission action. The order is also consistent with the provisions of the Act dealing with the distribution of licenses. The given reasons are factual and support the conclusion. Having reached the foregoing conclusions, the function of the Court is at an end in a case such as this." (Footnote references omitted)

In the KOB *ad hoc* proceeding, the Commission also did not, summarily or otherwise, depart from established principles but rather followed a course "anticipated and provided for" in its basic rules.[7] Accordingly, its action amending 73.25 to permit two Class I stations to operate on the frequency 770 kc was entirely proper even though it later followed a somewhat inconsistent approach in breaking down other clear channel stations. The Court's 1965 opinion does not hold to the contrary.

Requirements of the Mandate

In view of the foregoing, the procedures adopted by the Commission for the purpose of implementing the Court's 1965 mandate must rest on the assumption that the September 3, 1958, amendment to Section 73.25 of the Rules was properly and lawfully adopted, became final upon affirmance by the Court of Appeals in 1960, and presently defines the allocation status of the frequency 770 kc.[8]

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[7] In this standard broadcast proceeding, the basic rules are Sections 73.21 through 73.38 (1 Pike & Fischer RR 73:21-73:38) instead of Section 73.606 which provides for the allocation of television channels. As previously pointed out, Section 1.566 (formerly Section 1.72) specifically defines the course to be followed in seeking *ad hoc* amendments to the rules (see footnote 3 *supra*) and KOB properly set this proceeding on that course on February 3, 1944, when it filed the instant applications and its petition for an amendment to the rules.

[8] Hubbard emphasizes this point because ABC claims that the Court's 1960 ruling was an affirmance of the Commission's 1958 decision only if the Commission gave ABC fair and equitable

[footnote continued]

This being the case, the Commission, as indicated above, must first "make a new assessment of the public interest needs in the Southwest" and determine on the basis thereof, and in the light of new broadcast facilities (i.e., Class II-A stations) now available, whether KOB still requires Class I facilities or could adequately serve its area with Class II-A facilities.

If the determination is that Class II-A facilities will suffice a new amendment of Section 73.25 reclassifying 770 kc would be in order unless, of course, newly developed considerations, including changes in allocation policy, dictate some other result. However, if, as Hubbard believes will be established, the reassessment shows that there has been no significant change in service requirements or availabilities since the 1958 decision, Section 73.25, as amended by *that* decision, would be left undisturbed.

In the latter event, the Commission must proceed to give ABC its hearing "as to whether one or more of the other clear channels should accommodate two Class I-B stations, to the end that comparatively equal channel facilities may be provided for the flagship stations of the three networks in the manner most favorable to the public interest." It is in this connection, and this connection only, that the Court's requirement as to comparable network facilities is significant.

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channel facilities vis-a-vis the other networks prior to recognizing the effectiveness of and implementing the 770 kc amendment. There is no basis for such an interpretation of the 1960 opinion. The Court's affirmance was final and unqualified. Thereafter, in view of the Court's caveat, it was the responsibility of the Commission to adjust any frequency inequity caused to ABC as a network by the amendment. The 1965 opinion merely points out that to date the proceedings held and the actions taken by the Commission have not satisfied the adjustment requirement.

Procedures

While its 1965 decision is not entirely clear in some respects, the Court does, in Hubbard's opinion, rule out the use of a proceeding such as the one held on the pending applications following the 1960 appeal[9] (or the one proposed by the July 14, 1965, Memorandum Opinion and Order) as a vehicle for complying with the foregoing requirements of the mandate. In this connection, the Court stated as follows: (345 F.2d at 958)

> "The Commission's special hearing relative to the issue of prejudice was by its order directed only to the question of whether the admitted difference in treatment of the ABC station, resulting in 'a significant loss of secondary and primary service through directionalizing its night-time operation to protect that of KOB', . . . 'will adversely affect the competitive position of the ABC radio network and, if so, whether such fact would require the alteration' of the result of the 1958 decision, requiring directionalization of WABC. That approach resulted in Commission findings and conclusions that ABC had failed to carry its burden of proving that its competitive position over the country as a whole will be adversely affected by the Commission's 1958 decision requiring it to directionalize to protect KOB. We need not decide whether this conclusion is warranted, because it is not within the scope of our 1960 opinion, which indicated that compar-

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[9] As the record shows, Hubbard strongly opposed this proceeding, pointing out that as a licensing proceeding it was totally defective because it did not include all of the then pending mutually exclusive applications. Obviously, it was much too restrictive to support a valid rule making determination.

able channel facilities should be provided for all the networks." (Footnote references omitted)

Only in a rule making proceeding, in which all interested parties, including NBC and CBS, have an opportunity to participate, can the Commission properly explore and determine the question as to comparable channel facilities for the networks. Furthermore, the Court's 1965 opinion is in response to ABC's Petition for Review of the Commission's clear channel decision (Case No. 17567), and the Court has held that the Commission did not properly explore ABC's situation in that proceeding. Accordingly, the proper, if not required, procedure for the Commission to follow now is to reopen the record in Docket No. 6741 for further proceedings in accordance with the Court's instructions. Long and involved evidentiary hearings, such as contemplated by the now vacated Memorandum Opinion and Order of July 14, 1965, are not necessary to make the determinations required by the Court's mandate, including the reassessment of service needs in the Albuquerque area. See *Transcontinent Television Corp. v. Federal Communications Commission,* 308 F.2d 339 (1962) and *Goodwill Stations, Inc. v. Federal Communications Commission,* 325 F.2d 637 (1963).

Reopening of the Docket No. 6741 proceeding, rather than instituting a new one designed only to explore the particular matters specified by the Courts, would also permit a more comprehensive evaluation of the accomplishments of the allocation policies adopted by the Commission in the clear channel Report and Order released September 14, 1961. It may well be that the Class II-A breakdown approach is not producing the improved service results that it should and that the approach contemplated by the Further Notice of

Proposed Rule Making released April 15, 1958 (Docket No. 6741), should be reconsidered. The 1958 "Further Notice" proposed breaking down the frequencies 660 and 880 kc, as well as 770 kc, to accommodate new additional Class I stations, and it is more than apparent that the questions raised by the Court's 1965 decision would be resolved by such a breakdown whether or not a special reassessment of the particular needs of the Albuquerque area was made.

Conclusions

It is of paramount importance that, after the many years of indecision and litigation in connection with this KOB-WABC controversy, the Commission adopt and vigorously prosecute a proceeding which will effectively and finally resolve the problems. At the heart of the matter is Section 73.25 and related provisions of the Rules. According to the Court of Appeals, either the different treatment accorded 770 kc vis-a-vis 660 and 880 kc must be justified, or the rules must be appropriately amended to eliminate the different treatment. Until this is done, normal licensing procedures which hold the final answer to the controversy cannot be effectively pursued.

Since the basic problem lies with the rules, the solution should be sought through the rule making process in a proceeding broad enough to develop all of the information necessary to reach the proper solution but narrow enough to avoid another extensive period of litigation.

In Hubbard's opinion, there are two principal questions to which the Commission should seek answers before finally deciding on the specific rule amendments, if any, to be adopted. They are as follows:

1. Whether, in light of present conditions, the public interest can best be served if Station KOB operates as a Class I station on 770 kc.

2. Whether, for the purpose of providing equal channel facilities for the flagship stations of the three networks or for other reasons, the public interest would be better served by requiring certain additional clear channels, including 660 kc and 880 kc, to accommodate two Class I stations.

In addition, the Commission should request and obtain information that will permit a meaningful evaluation of the significance of New York City network owned stations in relation to radio network operations. It must be assumed that, regardless of the approach followed or the result reached in the further proceedings involving the KOB-WABC controversy, the matter will again be presented to the Court. When it is, the Court should have a realistic record picture of the significance of the radio network operation in terms of today's broadcast industry and of the part any individual station plays in the network operation. The "Flagship" concept advanced by ABC and accepted by the Court, to date, has been grossly exaggerated. The fact of the matter is that WABC is just another local New York City station primarily devoted to "rock and roll" and disc jockey chatter programing. It has little, if any, significant relationship to the ABC network operation—"Flagship" or otherwise—and the Court should be officially advised as to the facts.

As indicated above, all of the foregoing information may be obtained, and lawful actions taken on the basis thereof, through the rule making process without becoming involved in extensive and procedurally

complicated evidentiary hearings. Hubbard strongly urges this approach, i.e., by reopening and providing for further proceedings in the Docket No. 6741 clear channel case. This, it is submitted, will provide the most effective and expeditious method of complying with the Court's 1965 mandate and the final resolution of the KOB-WABC controversy in accordance with the terms of that mandate.

In so recommending Hubbard is not indicating agreement with the 1965 Court decision or with the public interest requirements set forth therein. In fact, Hubbard does not agree with the "comparatively equal channel facilities for networks" concept espoused by the Court and feels that the *ad hoc* procedures followed by the Commission here are entirely adequate for making changes in the allocation status of AM frequencies, including the clear channels. The important consideration now, however, is to resolve the controversy at the earliest possible time. The steps herein recommended are believed to be conducive to this objective.

Respectfully submitted,

HUBBARD BROADCASTING, INC.

By /s/ Frank U. Fletcher

Frank U. Fletcher

By /s/ Robert L. Heald

Robert L. Heald

By /s/ Edward F. Kenehan

Edward F. Kenehan

Of Counsel:

Fletcher, Heald, Rowell, Kenehan & Hildreth
1023 Munsey Building
Washington, D.C. 20554

May 27, 1966

CERTIFICATE OF SERVICE

I, Trudell P. Baim, a secretary in the law offices of Fletcher, Heald, Rowell, Kenehan & Hildreth, do hereby certify that copies of the foregoing "Memorandum of Views" were sent this 27th day of May, 1966, by first-class United States mail, postage prepaid, to the following:

Vernon L. Wilkinson, Esq.
McKenna & Wilkinson
1735 DeSales Street, N.W.
Washington, D.C. 20036
Counsel for American Broadcasting Companies, Inc.

Chief, Broadcast Bureau
Federal Communications Commission
Washington, D.C. 20554

/s/ Trudell P. Baim

Trudell P. Baim

APPENDIX D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	DOCKET NO.
	)	6584
HUBBARD BROADCASTING, INC. (KOB)	)	FILE NO.
	)	BMP-1738
Albuquerque, New Mexico	)	
	)	
For Modification of Construction Permit	)	
	)	
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. (WABC AND AUXILIARIES)	)	DOCKET NO.
	)	14225
	)	FILE NO.
New York, New York	)	BR-167
	)	
For Renewal of Existing License	)	
	)	
In the Matter of	)	
CLEAR CHANNEL BROADCASTING IN THE STANDARD BROADCAST BAND	)	DOCKET NO.
	)	6741
	)	

To: The Commission

REPLY OF HUBBARD BROADCASTING, INC.
TO
BROADCAST BUREAU'S MEMORANDUM
AND
ABC'S SUGGESTED PROCEDURES

On May 27, 1966, Hubbard Broadcasting, Inc., American Broadcasting Companies, Inc., and the Broadcast Bureau responded to the Commission's

request for an expression of views as to the steps to be taken by the Commission in implementing the mandate of the U.S. Court of Appeals for the District of Columbia Circuit in *American Broadcasting-Paramount Theatres, Inc., et al, v. Federal Communications Commission, et al,* 120 U.S. App. D.C. 264, 345 F.2d 954 (1965). Previously, the Court had *last* ruled on the KOB-WABC controversy in *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission,* 108 U.S. App. D.C. 83, 280 F.2d 631 (1960).

Hubbard's Position

In its response Hubbard recommended that the clear channel proceeding (Docket No. 6741) be reopened and used as the procedural vehicle for re-evaluating the allocation status of the frequency 770 kc. With this recommendation, both ABC and the Broadcast Bureau agree.

In making the required re-evaluation, however, Hubbard expressed its view that the Court's 1965 mandate first requires the Commission to reassess the service needs of the Southwest for the purpose (and solely for the purpose) of determining whether changed conditions dictate a change in 770 kc's present status as a Class I-B channel. If, as the Broadcast Bureau now suggests is likely, present conditions reflect the same public interest service requirements, the mandate, in Hubbard's opinion, clearly indicates that the Commission's 1958 findings and conclusions in the *ad hoc* proceeding, and the 770 kc breakdown amendment resulting therefrom, are to be left undisturbed. In this event, however, the Commission must proceed to give ABC "... the opportunity for a hearing as to whether one or more of the other clear channels should accommodate

two Class I-B stations, to the end that comparatively equal channel facilities may be provided for the flagship stations of the three networks in the manner most favorable to the public interest." 345 F.2d at 960.

Quite obviously the Court is seriously concerned about the "inequitable" treatment of ABC vis-a-vis the other networks, but, just as obviously, the Court has not mandated the Commission to eliminate the inequities regardless of the cost in terms of the overall public interest—and particularly the requirements of Section 307(b) of the Communications Act. Actually, the Court's decision is quite clear in this regard, for it pointedly explains that its concern stems from the failure of the Commission "... in any of its decisions ... (*to give*) *adequate public interest reasons* to justify the inequitable position given the ABC flagship station as compared with the flagship stations of other networks—and indeed with all other clear channel stations" (underscoring supplied). 345 F.2d at 958. In particular, the Court points out that the clear channel Report and Order does not contain "... adequate reasons ... which might explain and justify this treatment from a public interest standpoint." 345 F.2d at 958.

The Court has held, not that the Commission must, or even should, eliminate the action which created the inequity, but rather that the inequity either be eliminated by other actions consistent with the public interest (i.e., by breaking down other channels) or properly explained. To contend, as do ABC and the Broadcast Bureau, that the action creating the inequity, i.e., the 1958 amendment of Section 3.25 of the Rules, must be set aside even though the public interest basis for that action still applies today is to accuse the Court

of rendering a completely meaningless and futile—even a deceiving—opinion in 1960.[1]

The fact of the matter is that the 1956 [sic] opinion reminds the Commission that the Court approved of the September 1958 action and still approves of it provided conditions remain substantially unchanged. In addition, however, it reminds the Commission that, in the absence of a reasoned explanation to the contrary, the same public interest considerations should apply to the other clear channels and that ABC, in the interest of its network competitive position, is entitled to be heard on that question and to a reasoned and meaningful decision.

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[1] 1960 opinion contains the following: (280 F.2d at 635)

"In its decision of September 5, 1958, the Commission has in effect ruled that even if network competition would be adversely affected, it would not be in the public interest to delay further the rule change necessary to permit KOB to operate as a Class I station. Summarizing its findings of fact and conclusions, the Commission stated that 'it is apparent . . . that *only* if KOB is restored to the status of a Class I-B station would it be enabled to provide a broadcast service even nearly adequate to fulfill the needs of the comparatively greatly underserved populations in the Southwest.' The finding of engineering availability and local need was based on substantial evidence. It appears to us to be in furtherance of the policy of 47 U.S.C.A. §307(b) that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."

Unless it can be shown that the service needs of the Southwest have changed since 1958, these public interest considerations still pertain insofar as the frequency 770 kc is concerned.

Recommendations of ABC and the Broadcast Bureau

The positions of ABC and the Broadcast Bureau to the contrary, i.e., that the Commission should now completely ignore the *ad hoc* 770 kc proceeding and resolve the KOB-WABC controversy simply by rewriting the clear channel decision to include 770 kc in the Class II-A category, cannot be supported. If, for no other reason, the question of 770 kc's allocation status was not litigated in the clear channel proceeding, and the present record in that proceeding will not support any action affecting 770 kc's status which is in any way inconsistent with the *ad hoc* record or the 1958 decision based on that record. Otherwise, why would the Court direct that "... the Commission ... make a new assessment of the public interest needs in the Southwest"?

While ABC has recognized this in the past,[2] and prior to the 1965 opinion actually rested its case on the contrary position, it is understandable why it would now, as an adversary, attempt to reverse its field. On the other hand, the Broadcast Bureau's position, i.e., that this long standing controversy be resolved on the basis of administrative convenience rather than the public interest, is not understandable.

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[2] In Reply Comments directed to the Third Notice of Proposed Rule Making in Docket No. 6741 filed June 1, 1960, ABC made the following statement:

"Since the Commission itself has chosen not to include 770 kc in its Third Notice, ABC makes no comments at this time on WMC's proposal that 770 kc be further duplicated in Memphis, Tennessee."

Argument in Opposition to Broadcast Bureau's Recommendations

It is more than apparent that the Broadcast Bureau recognizes that a better overall public interest result can be achieved if KOB operates as a Class I-B station with the allocation status of the other clear channels changed accordingly. However, it recommends against this approach, and suggests instead an easy way out, because to ". . . explore the assignment of a Class I-B station or stations on the other channels on which class I-A stations are presently operating would require the Commission, in effect, to re-evaluate and reconsider its Report and Order in the clear channel rule making order . . .". As hereinafter explained, this task may not be as involved and complicated as the Bureau seems to fear, but, in any event, this is precisely the function the Congress expected the Commission to perform when it enacted first the Radio Act of 1927 and later the Communications Act of 1934. If the Commission is not up to the job, then it should go back to Congress with a view to seeking a legislative solution to the clear channel problem, and particularly to the KOB problem. Neither the public interest, nor the private interests of those attempting to serve the public interest, should be thrown to the wolves in the cavalier manner urged by the Broadcast Bureau simply because a Court's insistence on consistency makes the Commission's task a little more difficult.

It must not be forgotten that this is a situation of the Commission's own making, and the Commission, therefore, has a special obligation to see it through to a fair conclusion. KOB was placed on the frequency 770 kc in 1941 because the Commission ordered it on that frequency and not because KOB applied for the assignment. Admittedly, this was occasioned by the

entry into force of the 1941 NARBA, but that event also occasioned many other dislocations that have long since been resolved.

That the KOB dislocation has not yet been adjusted does not change the basic considerations or remove the need for a solution to the problem which will restore KOB to the Class I status it enjoyed prior to 1941.

Prior to March 29, 1941, Stations KOB and WABC, as well as WBZ, were all Class I stations that had operated on clear channel frequencies from the date of inception of that service in 1928. None had operated on the frequencies assigned as a result of NARBA. All were pioneer stations that first started operations in the early 1920's. All were designed to render service to widespread rural areas; KOB to the sparsely-settled Rocky Mountain Regions; WABC to the Middle Atlantic area; WBZ to the New England area. The public interest and need for KOB's secondary service was at least as great as that of either of the other stations, and, in view of the great multiplicity of other Class I stations in the Eastern section of the country, the equitable rights of the isolated people of the Rocky Mountain Region, under Section 307(b), were, and continue to be, clearly superior. As a result of the loss by KOB of its Class I service, there are no Class I stations in New Mexico and there are only two in the eight large states of the Rocky Mountain Region. On the other hand, there is a great multiplicity of overlapping Class I stations in the Eastern United States, with New York City *alone* having five besides WABC, and the State of New York, seven.

The 1941 NARBA, by its terms, did not operate in derogation of the domestic rights of any of the United States clear channel stations. The treaty did not assign particular stations to particular channels. It did reduce

the number of clear channels available for United States stations, but left to this country the specific assignment of such channels by the Federal Communications Commission in accordance with the provisions of the Communications Act. For 25 years KOB has been awaiting the replacement Class I channel assignment to which it and the public it serves are entitled.

Legislation and Other Solutions

If the Commission is unable or unwilling, at this time, to promptly take effective measures designed to finally complete the task assigned to it in 1941, it should, as suggested above, request the Congress to pass appropriate legislation. Actually, in view of the appellate history of this proceeding, and the confused posture in which appellate decisions have left the matter, legislation may be the more appropriate method of solving the problems regardless of the circumstances. As the Court has pointed out, on occasion the administrative process is presented with "... situations well-nigh impossible of solution." If this in [sic] one of them, the Commission should recognize it and pass the matter along to Congress.

On the other hand, there does appear to be a reasonable way to effectively and expeditiously resolve the clear channel breakdown problem and the KOB-WABC controversy by a rule making proceeding involving neither the extensive new explorations feared by the Bureau nor the due process deficiency so patently present in the simple rewrite approach recommended by both ABC and the Bureau.

While the present Docket No. 6741 record does not contain adequate evidence to dispose of the 770 kc question on any basis other than that followed in

adopting the 1958 amendment, it does, in Hubbard's opinion, contain sufficient evidence to support further amendments which would be consistent with the 770 kc I-B breakdown and also compatible with the Court's 1965 mandate. In brief, on the basis of the present record, Section 73.25 and related provisions of the Rules could be amended to accommodate a system of alternative I-B or II-A use of the broken down channels to be implemented by a combination of rule making and adjudication.[3]

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[3]The following merely illustrate the type and form of amendments that might be adopted to provide such a method of implementation:

Section 73.22

* * *

(a) One Class II-A station may be assigned on each channel listed in Section 73.25(b) subject to the provisions of that section.

* * *

Section 73.25

* * *

(a) On each of the following channels, one Class I station will be assigned, operating with power of 50 kw: 640, 650, 660, 700, 750, 760, 820, 830, 840, 870, 1040, 1160, and 1200.

(b) On each of the following channels two Class I stations or one Class I station and one Class II station may be assigned: 660, 670, 720, 770, 780, 880, 890, 1020, 1030, 1100, 1120, 1180 and 1210. Any applicant applying for the second Class I station on these frequencies shall accompany its application with a proposed plan for directional operation for the existing Class I station on the channel and a showing that the operation of two directionalized Class I stations, as proposed, would best meet the requirements of Section 307(b) of the Communications Act as compared with a single Class I station on the channel or with one Class I and one Class II-A station operating in the city of applicant's proposed second Class I station.

* * *

Both ABC and the Bureau recognize that, in terms of service gains (primary and secondary), a Class I-B breakdown of the frequencies involved is much more desirable insofar as the new stations are concerned. As the Bureau points out, "the assignment of new Class I-B stations with their higher degree of protection from that afforded Class II stations would have resulted in greater coverage . . ." and consequently, the elimination of more white areas in the underserved areas of the United States. What is not known now, however (and never will be known with certainty if the Commission continues to determine both the type of breakdown and the location of the new station solely by the "allocation" approach), is the extent of coverage that would be lost to the present Class I-A stations if required to directionalize. Only in an *ad hoc* proceeding similar to the 1958 770 kc breakdown proceeding, involving a specific proposal (and location) for the new station and a specific proposal for directionalized operation of the existing station, can the Commission judge the comparative public interest advantages of a Class I-B breakdown as opposed to a Class II-A breakdown. In such a proceeding, as in this 770 kc *ad hoc* case, service gained by the new station may be intelligently weighed against service lost by the existing station, and a realistic determination made as to whether the new station should be awarded Class I-B facilities or be limited to a Class II-A status.

If Section 73.25, and related provisions of the Rules, were appropriately amended to accommodate such an alternative breakdown technique (preferably without the geographical limitation now spelled out in Section 73.22), any of the other twelve broken down channels (other than 770 kc) could be utilized on a I-B basis if

the interested applicant showed a sufficient gain in service over Class II-A operation and accompanied its application with a directional proposal for the existing station on the basis of which the Commission could determine whether any loss of service by the existing station was or was not outweighed by service gains of the new station operating with Class I-B facilities.

On this basis, each channel breakdown could be decided on its individual merits and intelligently compared with other breakdowns in the light of well recognized public interest standards and criteria. If cases were factually, and public interest-wise, similar, they would all be accorded similar treatment in terms of grant or denial. If factually, and public interest-wise, different, the difference as spelled out in the record would explain why one might be granted and the other denied. In either event, the objections raised by the Court of Appeals in the 1965 opinion would be eliminated even if some channel inequity resulted to networks in the process.

In all probability, this flexible approach to the problem would even eliminate any actual channel inequity among the networks. For instance, under such a plan, 660 kc, as the Docket No. 6741 record clearly shows, could and probably should be used for Class I-B facilities at Phoenix, Arizona. Furthermore, in view of the interest shown in such use of that frequency, a Class I-B application on the basis indicated above very likely would be forthcoming. But, if no other applicant was available, ABC could apply—depending, of course, on just how much importance it really attaches to comparable New York City network facilities.

Admittedly, it might be argued in such a licensing proceeding that 660 kc could not be used for Class I-B

facilities in Phoenix or elsewhere, perhaps because such a station would unduly restrict the service of Station KFAR in Alaska.[4] In view of the evidence in the clear channel record, it is doubtful that any such restriction would have public interest significance, but, if it did, it would also provide the Commission with the explanation as to different treatment for 770 kc and 660 kc which the Court found lacking in the present clear channel decision.

Hubbard is not suggesting that the amendments proposed above are the only amendments that will satisfy the Court's mandate and resolve the KOB-WABC controversy. As indicated, however, these amendments could be adopted without extensive further proceedings and, it is believed, would solve the problems. The proposed amendments also pointedly illustrate the fundamental conflict between the views of ABC and the Bureau on the one hand and Hubbard on the other, and the heart of the matter is the Court's 1965 mandate. ABC and the Bureau contend that the 1958 *ad hoc* action must or should be conformed to the Commission's September, 1961, clear channel decision. Conversely, it is Hubbard's position that the Court has charged the Commission with arbitrary and capricious action in the clear channel decision and has directed it to conform that decision with the findings and

[4]Even if the Commission does not accept these suggestions of Hubbard for a clear channel assignment plan contemplating partial implementation by the licensing (adjudicatory) process, 660 kc could be broken down for I-B use at Phoenix and 1030 kc made available to KFAR. Since four of CBS's I-A channels have been broken down for II-A stations, as compared to one of ABC's, this would probably be sufficient to satisfy the Court insofar as comparable network facilities is concerned. However, Hubbard recommends the alternative I-B or II-A approach.

conclusions of the *ad hoc* proceeding *provided present day factual conditions are substantially similar to thos* [sic] *that existed in 1958 when the 770 kc I-B breakdown was incorporated in the Rules.* As explained above, the contentions of ABC and the Bureau meet neither the requirements of the Court's mandate nor well established public interest criteria.

Summary

In view of the long and admittedly difficult and complicated history of these proceedings, their principal objective, or at least the principal objective of the KOB proceeding, seems to have been lost in the shuffle. That objective is to find a Class I facility for Station KOB to replace the one it lost through no fault of its own with the entry in force of 1941 NARBA. The simple fact of the matter is that that treaty has never been fully implemented and will not be until the KOB problem is solved.

If the Commission is unable to find a solution, because of difficult court decisions, or for any other reason, the matter should be promptly referred to Congress for appropriate legislation. Since the problem was created by the Congressional act of ratifying a treaty, the Congress could properly effect the solution without establishing an undesirable precedent [sic].

As Hubbard points out, however, the finding of a solution at the Commission level will not be as burdensome or difficult as the Broadcast Bureau makes it appear. It will not be found, however, if the defeatist attitude of the Broadcast Bureau prevails, for the Bureau's approach defies reason, ignores the only evidence supported public interest determinations yet

made with respect to the KOB-WABC controversy, abandons fundamental principals of precedural [sic] due process, and invites another extended period of litigation.

After 25 years the Commission must not now abandon the public and its own public interest responsibilities with a view to resolving this controversy simply in the interest of administrative convenience. Rather, it should realistically face up to the task of meeting the Court's requirements, by reassessing the service needs of the Southwest to determine whether a reamendment of the 1958 770 kc breakdown is necessary in view of changed conditions and by adjusting and revising its clear channel decision after taking whatever procedural steps are necessary, if the reassessment shows no change in the service needs of the Southwest.

In the meantime, since Section 73.25 of the Rules will continue in its present posture (providing for two Class I-B stations on the frequency 770 kc), there is no reason for not permitting KOB to continue operating with the facilities specified in BMP-1738.

Respectfully submitted,

HUBBARD BROADCASTING, INC.

By /s/ Frank U. Fletcher
Frank U. Fletcher

By /s/ Robert L. Heald
Robert L. Heald

By /s/ Edward F. Kennehan
Edward F. Kennehan

Its Attorneys

Of Counsel:
FLETCHER, HEALD, ROWELL, KENEHAN
& HILDRETH
Washington, D.C. 20554
1023 Munsey Building

June 13, 1966

CERTIFICATE OF SERVICE

I, Trudell P. Baim, a secretary in the law offices of Fletcher, Heald, Rowell, Kenehan & Hildreth, do hereby certify that copies of the foregoing "Reply of Hubbard Broadcasting, Inc., to Broadcast Bureau's Memorandum and ABC's Suggested Procedures" were sent this 13th day of June, by first-class United States mail, postage prepaid, to the following:

Vernon L. Wilkinson, Esq.
McKenna & Wilkinson
1735 DeSales Street, N.W.
Washington, D.C. 20036
Counsel for American Broadcasting
Companies, Inc.

Chief, Broadcast Bureau
Federal Communications Commission
Washington, D.C. 20554

/s/ Trudell P. Baim
Trudell P. Baim

APPENDIX E
[17 F.C.C. 2d 257]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 69-405
29624

In the Matter of	)	
	)	
Clear Channel Broadcasting in the Standard Broadcast Band	)	Docket No. 6741
	)	
	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 22, 1969; Released: April 25, 1969,

By the Commission:

Commissioner Cox concurring and issuing a statement;

Commissioner Johnson and H. Rex Lee concurring in the result.

1. This Notice of Proposed Rule Making initiates the action forecast in the Memorandum Opinion and Order of July 20, 1966 (4 F.C.C. 2d 606), which contemplated the reopening of Docket 6741 as a vehicle for the consideration and disposition of questions raised in a remand of February 25, 1965, by the U.S. Court of Appeals for the District of Columbia Circuit, with respect to matters involved in the long-standing "KOB problem". *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission,* 120 U.S. App. D.C. 264, 345 F.2d 954, 4 R.R.2d 2006. This

matter involves the mode of operation of Station KOB, Albuquerque, N.M., which now operates on 770 kc/s essentially as a Class II station, concerning which there has been more than 25 years of controversy between KOB and WABC, the I-A station on that channel at New York City.[1]

Background

2. The history of this matter is extremely long and complicated. Nevertheless, it must be recounted, at least in capsule form, to provide the necessary background for an understanding of the proposals contained herein.

3. For a number of years prior to 1941, KOB operated on 1180 kc./s. with power of 10 kilowatts, sharing nighttime hours with KEX, Portland, Oregon. From November 19, 1938, both stations were licensed for unlimited time operation on the channel. On November 27, 1939, KEX's license was modified to specify operation on 1160 kc./s. and from that date KOB was the only station operating at night on the frequency 1180 kc./s. On May 7, 1940, a construction permit was issued to KOB for an increase in power to 50 kw. This permit designated KOB as a Class I station.

4. On March 29, 1941, the first North American Regional Broadcasting Agreement (NARBA), which had been signed in Havana in [258] 1937, went into effect. To implement the new treaty arrangements, changes were made late in 1940 and early in 1941 in the frequencies of many U.S. stations, to clear the six I-A

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[1] Until 1953 the New York City I-A station had the call letters WJZ. "KOB" and "ABC" are often used herein to mean the parties who at various times have been the licensees of these stations.

channels which the Agreement provided for Mexico, and some sharing of channels became necessary for stations previously occupying unduplicated clear channels. Class I Stations WABC (then WJZ), New York City, and WBZ, Boston, were reassigned from their former channels to 770 kc./s. and 1030 kc./s., respectively, in this rearrangement. In the rearrangement, in part because of its proximity to the Mexican border, no frequency could be found for KOB on which it could operate with facilities and protection comparable to those which it had achieved by 1940 on 1180 kc./s.

5. Coincident with the entry into force of NARBA, KOB was licensed on 1030 kc./s. with power of 10 kw, and on June 3, 1941, it was granted a Special Service Authorization (SSA) to operate on this frequency with 50 kw-D/25, kw-N. Because interference received from WBZ, Boston, Massachusetts, was deemed excessive, in November, 1941, this SSA was modified to specify 770 kc./s., 50 kw-D, 25 kw-N.

6. In 1944, KOB filed applications requesting modification of its construction permit on 1180 kc./s. and a modification of its license to specify operation on 770 kc./s. (MP-1278, ML-1799). These applications were designated for hearing in Dockets 6584 and 6585. A hearing was held but no decision was reached at that time.

7. On February 20, 1945, the Commission instituted the Clear Channel proceeding (Docket 6741), and on August 9, 1946, the Commission issued a Public Notice which placed the above KOB applications, among others, in the pending file to await a clear channel decision. The relationship between the present "KOB matter", and the Clear Channel proceeding and 1961

decision therein, is one of the important aspects of this matter.

8. ABC had opposed both the original assignment of KOB on 770 kc./s. and the successive extensions of KOB's Special Service Authorization thereon, and in 1950 appealed one of these extensions of the U.S. Court of Appeals (D.C.). An opinion issued by the Court in July 1951 upheld the Commission's authority to grant the SSA, but held that long continued operation under such authorizations constituted a modification of WABC's license. It ordered the Commission to resolve the problem "with all deliberate speed."[2]

9. Because of the Court's mandate that the "KOB matter" should be resolved expeditiously, in 1952 the KOB applications were removed from the pending file where they had been placed in 1946 pending a decision in the Clear Channel proceeding (8 R.R. 356). On May 27, 1955, Dockets 6584 and 6585 were reopened and the applications designated for further hearing on a large number of issues concerning various modes of operation on 770 kc./s. or 1030 kc./s., including operation as a Class I station on a "mutual protection" basis with WABC or WBZ (i.e., KOB and the eastern station both directionalized at night), operation as a fulltime Class II station on one of these channels protecting the eastern station's 0.5 mv./m. 50% skywave [259] contour at night, or on various other bases on one frequency or the other. ABC's request that other frequencies be considered for KOB—in addition to the two directly involved—was denied, on the ground that it would

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[2] *American Broadcasting Company v. FCC*, 191 F.2d 494, 7 R.R. 2033 (1951).

involve a "miniature Clear Channel hearing" and reattachment of the KOB case to the over-all proceeding in docket 6741.[3] A lengthy hearing was held in 1955 and 1956, and an initial decision and commission decision of January and September 1958 respectively both decided that KOB should operate as a Class I station on 770 kc./s., with both it and WABC directionalizing at night to afford each other mutual protection to their respective 0.5 mv./m. 50% skywave contours. The decision reflected an extensive evaluation of the service gains and losses under the various modes of operation encompassed by the issues. The key points were that: (1) operating in any manner on 1030 kc./s. KOB would render less service than it would operating on a corresponding basis on 770 kc./s., and the losses to WABC in the East would represent less serious deprivation of service than would similar losses to WBZ if KOB operated on 1030 kc./s., in view of other available services; and (2) operating as a class I station on 770 kc./s., KOB would render a skywave service which it would not have if it operated as a class II station protecting WABC, and also—and more important—it would render a first primary service at night to some 118,000 more persons. It was also made clear in the first paragraph of the decision that it related to a

[3] 12 R.R. 583, 587: "... the only hope for solution of the KOB problem, short of a simultaneous decision in the Clear Channel proceeding, requires the Commission to restrict its consideration to the two frequencies which have been directly involved since the problem first arose in 1941. Whatever equities there are for considering other clear channels, and there are some, they are dwarfed by the compelling need for the earliest termination of this proceeding possible, consistent with a fair and judicious hearing and decision." ABC's 1955 request for enlargement of the hearing issues to include other frequencies was rejected in 1956 for the same reason (13 R.R. 861).

permanent assignment for KOB.[4] WABC and KOB were given permission to submit appropriate directional radiation patterns.

10. Two other developments occurred during the pendency of this 1955-1958 proceeding. In August 1955 the Commission issued a decision permitting KOB to continue its SSA operation on 770 kc./s. (50 kw., day, 25 kw., night, nondirectional) pending decision in the "KOB case"; ABC appealed this and in September 1956 the U.S. Court of Appeals (D.C.) ordered the Commission to take immediate action to end the interference to WABC thus caused (14 R.R. 2020).[5] Pursuant to resulting Commission order, in April 1957 KOB commenced operation on 770 kc/s with the same power but directionalized at night so as to protect WABC; this was its mode of operation until 1963 (see par. 13). In April 1958, shortly before the decision in dockets 6584-6585, the Commission took steps proceeding toward resolution of the long-standing Clear Channel proceeding, issuing a further notice of proposed rule making in docket 6741. This notice proposed to deal with the 25 U.S. I-A clear channels as follows: on five—770 kc/s, and on 660 kc/s and 880 kc./s. also used at New York City (by WNBC and WCBS respectively), and 1100 kc./s. and 1180 kc./s., the existing Class I-A stations would directionalize and an additional Class I assignment [260] be made, operating in substantially the same manner as that later decided on

[4] *Albuquerque Broadcasting Company (KOB)*, 25 F.C.C. 683, 684, 768, 777-782, 793-794; 16 R.R. 765, 766, 855, 866-871, 882, 883, 890.

[5] The court stated that the Commission's treatment of the KOB-WABC situation following the 1951 court mandate had not been "either adequate or prompt."

for KOB in the September 1958 decision, on a mutual nighttime protection basis with the existing I-A station. Specific western States were proposed for the location of the new class I stations on the four channels other than 770 kc./s.; it was stated that the location of the new class I station on 770 kc./s. was "undetermined". Fulltime duplicating class II assignments (generally similar to KOB's present mode of operation from 1957 to date) were proposed for 7 channels, and 12 channels were reserved for later consideration for "higher power". 1030 kc./s. was not included in any specific category; it was indicated that the "KOB proceeding" would assign KOB to it or 770 kc./s. and the other would thus become available for a class I assignment elsewhere in the West.

11. In September 1959, after consideration of comments filed in response to this notice, a substantially different approach to the Clear Channel proceeding was proposed, in a third notice of further proposed rule making (F.C.C. 59-972). Noting the showings in the comments as to the losses in existing service which would occur if some I-A stations were required to directionalize to protect co-channel class I operations (including some new "white areas"), the Commission proposed to make new duplicating class II assignments on the I-A channels generally, rather than providing for new class I stations on some of them. This approach was proposed for 23 of the 25 channels. As to 770 kc./s., it was stated that the operation by KOB on this frequency—as a class I station operating as decided on in the 1958 KOB decision—met the criteria of the overall proposal; as to 660 kc./s. it was stated that operation by KFAR, Fairbanks, Alaska, was likewise consistent with the proposed overall pattern;

and no further assignments on these channels were proposed.

12. ABC sought reconsideration of the 1958 KOB decision, and after denial appealed, again in both cases urging that other frequencies for KOB should be considered. The U.S. Court of Appeals (D.C.) affirmed the Commission's decision in 1961, "on the basis stated", and observed that "the position of ABC as a network should not be permanently prejudiced by forcing it to share a channel if other networks are given full use of clear channels"; and that the Commission should in the Clear Channel proceeding or otherwise, "seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks".[6] It was also stated that ". . . we do not believe that ABC has been or should be

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[6] "Whether this is to be done by permitting ABC to intervene in the clear channel proceedings now pending, or through some other means, is not for us to say. It may be that ABC can raise its claims in this regard by filing competitive applications when present licensees on other frequencies seek renewal or by seeking modifications of existing licenses held by others. Perhaps the Commission will afford, sua sponte, some other procedural remedy." *American Broadcasting Company-Paramount Theatres, Inc. v. FCC*, 380 F.2d 631, 635, 636, 20 R.R. 2001, 2005 (1961). WABC has never sought to obtain the facilities of another station, at renewal time or otherwise. The court had before it, as part of the record in the ABC appeal, the 1959 third notice in the Clear Channel proceeding, proposing to treat the other I-A channels differently from the resolution decided on for 770 kc./s. in the 1958 KOB decision. However, in its later 1965 decision, the court stated that while in 1961 it was aware of this proposal, "It was not known to us what decision as to the NBC and CBS channels (660 and 880 kc./s.), the Commission would ultimately reach in the clear channel proceeding and the language in our opinion, quoted above, was used by us in that background." See 345 F.2d 956, 4 R.R. 2008-2009 (decision, footnote 4).

precluded from a hearing on its claim that the public interest require that the loss of service in [261] the East, which class I broadcasting from Albuquerque produces, be absorbed by some eastern broadcaster other than WABC."

13. After this decision, in July 1961 the Commission directed a further hearing in docket 6584 on the question "whether the consideration of providing facilities to the ABC network in New York on a basis which is fair and equitable in comparison with the other radio networks should vary the conclusion reached that WABC should directionalize and share 770 kc./s. with KOB". In a decision on July 8, 1963, the Commission found that ABC had failed to prove that its position as a network would be adversely affected by the dual class I operation prescribed in the 1958 decision, granted KOB's application for unlimited time operation at Albuquerque, New Mexico, with directional antenna at night and denied ABC's 1959 application for renewal of license, which contemplated operation with a non-directional antenna. *Hubbard Broadcasting, Inc. et al.*, 35 F.C.C. 36, 25 R.R. 781. Program test authority to operate in the authorized manner (with 50 kw. directionalized at night) was granted in October 1963, but the operation has not been licensed.

14. Meanwhile, in September 1961 the Commission issued its Decision in the Clear Channel proceeding, docket 6741 (31 F.C.C. 515, 21 R.R. 1801). In this decision it was again concluded that—in general, and with the recognized possible exception of 770 kc./s.—Class I-A stations should not be required to directionalize because of the loss in existing service which would be involved; and that the service benefits which would

result from the duplication of fulltime Class II assignments, as proposed in the 1959 third notice, should be provided for at the present time only on 13 of the 25 channels, leaving the other 12 for consideration as to other means of using them to improve U.S. radio service, such as "higher power". The 13 channels selected for class II "duplication" included (besides two on which specific class II were provided to resolve international problems), 11 on which new fulltime "II-A" assignments in specified states in the West were provided for in Section 73.22 of the Rules. One of these was 880 kc./s., on which WCBS, the CBS New York City station, operates, and on which a class II-A station at Lexington, Nebr. has since been authorized. 1030 kc./s. was also among the duplicated channels, with a class II-A station now authorized at Casper, Wyoming. 660 kc./s., the NBC New York City channel, was not included in the 13 because of the existing operation thereon by a station in Alaska (noted in the third notice). With respect to 770 kc./s., the decision noted at length the "KOB problem" and its history, and it was concluded that "a major unlimited time facility should be assigned to New Mexico on 770 kc./s.", in view of the continuing need for service in that area. The exact form of such operation was not decided (as mentioned, further proceedings were in progress in docket 6584 at this time). ABC's request for consideration of other frequencies for KOB was again denied.[7] In 1962, after exten[262]sive consideration of

[7] "Whatever significance considerations relating to 'networking' and network competition may have in other contexts—a matter we do not decide here—we cannot conclude that the public interest would be served by attempting to redesign the entire nationwide allocation of frequencies adopted here solely in order to alleviate whatever adverse situation may confront ABC in

[footnote continued]

numerous petitions for reconsideration (including one of ABC), this decision was affirmed. See 24 R.R. 1595, 1605.

15. ABC again appealed, from this decision and from the 1963 KOB decision mentioned above. These appeals were sustained by the U.S. Court of Appeals (D.C.) in the February 1965 decision referred to in paragraph 1 hereof. This is discussed at greater length below; briefly, the Court held that there was not adequate explanation in the Commission's pronouncements for the disparate treatment given WABC in docket 6584—requiring it to directionalize at night to afford KOB mutual protection—while other I-A stations, particularly the other network-owned New York City stations on 660 and 880 kc./s., were allowed to remain either alone on their channels at night or with their existing service protected by the new class II assignment provided for, and in either case were not required to directionanize. The desirability of comparable treatment of network "flagship" stations was emphasized.

16. The Commission sought both clarification of the court's mandate (submitting a Memorandum Opinion and Order with proposed procedures) and certiorari from the Supreme Court; both requests were denied. The Commission thereupon rescinded that memorandum opinion and order and, in an order of April 7, 1966, directed KOB, ABC and the Broadcast Bureau to submit memoranda setting forth their views as to the manner in which the court's mandate should be

these respects." It was pointed out that there is no one obvious alternative to 770 kc./s., and that any consideration of alternatives would obviously take several years, postponing any certainty in the reallocation and necessitating a blanket "freeze" for the same indefinitely long period. See 31 F.C.C. 596-597, 21 R.R. 1832-1833.

implemented. These memoranda were duly submitted, along with a reply by KOB to those of ABC and the Broadcast Bureau. Thereupon the Commission issued the pronouncement of July 1966, referred to in paragraph 1, above, contemplating the present proceeding.

The Court's 1965 Decision

17. In its 1965 decision, the court of appeals stated that it did not regard the ultimate outcome of the KOB-WABC situation as consistent with its 1961 mandate, because of the "inequity", described as "self-apparent", in the solution reached as to WABC vis-a-vis WCBS and WNBC (and other I-A stations).[8] In particular, the Commission has been directed by the court to make a new assessment of the need for broadcast service in the southwest, to determine whether the operation of KOB as a class II station would fill that need. In the event it finds that a class I facility is still required, it must implement this requirement in such wise that WABC, the ABC flagship station in New York City, is removed from the disparate position that it would occupy with respect to the New York City stations of the CBS network, WCBS, and the NBC network, WNBC, or offer "compelling reasons", which it has not heretofore done, why such a disparate position is in the public interest.[9] [263]

[8] "Our affirmance of the KOB decision was conditioned, as heretofore noted, on the premise that in the end, fair and equitable channel facilities would be given ABC in comparison with other networks." Decision, footnote 7, 345 F.2d 958, 4 R.R. 2d 2011.

[9] "In view of the Commission's decision in the clear channel case resulting in a class I-A undirectionalized status for the CBS and NBC flagship stations, the ABC station should have the

[footnote continued]

18. The Court found that WABC had been placed in this position as a result of the decision of September 3, 1958, in docket No. 6584, which required WABC to directionalize to protect KOB, Albuquerque, as a class I station. This contrasted with actions taken in the Clear Channel proceeding (docket 6741), in which the Commission decided that the objective of increased nighttime coverage of underserved areas in western United States could best be achieved by the assignment of class II-A stations to certain of the I-A channels, including the channels on which New York City stations WCBS and WNBC operate, without requiring the directionalization of the I-A stations on those channels.

19. In directing a reassessment of the need of the Southwest for a class I station, the Court noted that this determination was made in 1958, and may no longer be valid in the light of the increased nighttime primary service subsequently provided, particularly by class II-A stations assigned pursuant to the decision in docket 6741, and other changed conditions.

The Position of the Parties

20. ABC, Hubbard Broadcasting, Inc. (Hubbard, now the licensee of KOB), and the Broadcast Bureau all filed memoranda in response to the April 1966 directive, and Hubbard replied to the views of the other two parties. All parties agree that the general service picture in the area of the southwest involved has not greatly changed

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opportunity for a hearing as to whether one or more of the other clear channels should accommodate two class I-A stations, to the end that comparatively equal channel facilities may be provided for the flagship stations of the three networks in the manner most favorable to the public interest."

since the 1958 decision, so as to alter the conclusions as to the need for service.[10] They also agree that if a comparison were made between the primary nighttime service rendered by any one of the class II-A stations assigned in the Clear Channel decision on other channels, and the service that it might render were the I-A station on its channel directionalized to protect it as a class I station, substantial increases in the number of persons and the areas receiving a first nighttime primary service would be demonstrated. However, in its decision in docket 6741, the Commission held that the disruption of long-established service which would result from the directionalization of the I-A stations could not be justified, and, accordingly, settled on the more restricted service rendered by the duplicating facilities without protection from the I-A's.

21. The result, reached on an ad hoc basis in the KOB/ABC proceeding, wherein WABC was required to directionalize is, all parties, admit, inconsistent with that reached in docket 6741.

22. In the instant proceeding, ABC would have us resolve this inconsistency by the issuance of an order amending section 73.22(a) of the rules by adding the frequency 770 kc./s. to the eleven channels broken down for class II-A assignments, and provide for such an assignment on that frequency for KOB in the State of

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[10] In the 1966 memorandum opinion and order (par. 16, above, which was later withdrawn) we expressed the view that the new II-A assignments mentioned by the court had not substantially lessened the need for additional service within the area which KOB would serve as a class I station; but that grants of other facilities in the area since 1956 had provided service to a small population—a few thousand—whithin the primary nighttime service area KOB would serve as a class I but not as a class II station.

New Mexico. The order would further grant ABC's application for renewal of license of Sta[264]tion WABC as a class I facility on 770 kc./s., 50 kw., U, at New York City, subject to the right of Hubbard Broadcasting, Inc., to a hearing on its pending application for 770 kc. in New York City, should Hubbard elect to prosecute such application; it would deny Hubbard's application for class I facilities on 770 kc. at Albuquerque, N.Mex., granting leave to amend to request construction permit and license for a class II-A station with 50 kw., DA-N, U. Since the New York City network stations would thus be afforded comparable facilities, ABC argues that such a solution would be in complete conformity with the mandate of the court of appeals and in furtherance of the public interest. Besides a lengthy recitation of the history of this proceeding, ABC asserts that the 1958 and 1963 KOB solutions were based on an approach to clear channel allocations taken in 1958 generally (the further notice in docket 6741) but later abandoned for general use because of the loss to existing I-A service involved; and therefore there is no reason to retain that approach here. It is said that the needs of the New Mexico area are no greater than those of other portions of the West to which the final clear channel decision gave only class II assignments. The loss to WABC and the ABC network—emphasized by the court—is stressed, and it is claimed that the gains from KOB class I operation would be minimal.[11] It is stated that ABC is satisfied

[11]ABC refers to material offered (but not received) in the 1962 further hearing in docket 6584, which showed the additional population which would receive a first nighttime primary service from a KOB class I as compared to a class II operation as 67,434, instead of the 118,000 mentioned in the 1958 decision.

with such a result, even though it prejudices "higher power" for WABC as compared to such a possibility for WNBC.

23. Hubbard (KOB), on the other hand, views the court as essentially upholding the validity of the Commission's determinations in favor of class I status for KOB on 770 kc./s. if ABC is treated comparably with other networks. It urges that the "reassessment" mentioned by the court should first be made, and that if that indicates the same need for service as reflected in the 1958 KOB decision—which Hubbard believes it will—then the KOB decision should stand and ABC should be afforded a hearing on whether WCBS and WNBC should not be treated similarly, all three flagship stations directionalizing to protect a class I facility in the West (see footnote 9, above). This, it is said, is the only significance of the court's requirement as to comparable network facilities. The ad hoc solution reached in docket 6584 for 770 kc./s. is defended as basically appropriate if this requirement is met (citing as precedent the breakdown of 850 kc./s. to a I-B channel in the "KOA" case and *Van Curler Broadcasting Corp. v. U.S.*, 236 F.2d 727 (1956)). It is suggested that rulemaking—in which all interested parties such as CBS and NBC can participate, and which is sufficient for such a purpose—is the approrpiate means of reaching the desirable result. It is also suggested that reopening docket 6741 will permit general exploration of clear channel allocation policies—for example, whether the new II-A assignments are adding as much as they were expected to to radio service. The questions to be answered in such a proceeding, as Hubbard sees them, are as follows: [265]

(a) Whether in the light of present conditions, the public interest can best be served if station KOB operates as a class I station on 770 kc./s.

(b) Whether, for the purpose of providing equal channel facilities for the flagship stations of the three networks or for other reasons, the public interest would be better served by requiring certain additional clear channels, including 660 kc and 880 kc., to accommodate two class I stations.

Hubbard also urges a full examination of the "Flagship" concept advanced by ABC, in the belief that it can demonstrate that, under present conditions of radio network operation, the importance of the concept has been grossly exaggerated—that WABC is, in fact, just another New York City "rock and roll" station, having no special significance in the ABC network. This, it is said, is necessary if the matter again goes to Court, as it likely will.

24. The Broadcast Bureau suggests three alternatives which the Commission might consider in the ultimate resolution of the "KOB problem".

(a) To require both the NBC and CBS flagship stations located in New York to directionalize their nighttime operations, and to assign a Class I-B station on each of their channels in the western part of the United States.

(b) To remove KOB from 770 kc./s. to a clear channel other than 660 or 880 kc. and to substitute a new class II-A on 770 kc. in the western part of the United States.

(c) To require KOB to operate as a class II-A station on 770 kc. and to protect WABC, which would operate as the dominant class I-A station on the frequency.

The Bureau rejects the first two alternatives, since in the clear channel proceeding the Commission has exhaustively examined the possibilities for duplicate operation on the I-A channels, and, despite the knowledge that class I-B operation by some or all of the duplicating stations would have resulted in greater coverage of undeveloped areas of the country, nevertheless, concluded that the assignment of these new stations as class II-A's would best serve the public interest. The Bureau states that the rationale controlling the method of allocation determined in docket 6741 is fully applicable to the frequency 770 kc., and it accordingly favors adoption of alternative (c), with the revision of the Commission's report and order in docket 6741 to the extent necessary to conform to this action. Pursuit of either of the other alternatives, it is said, would require a full reevaluation and reconsideration of the report and order in the clear channel proceeding. In connection with alternative (b) above, it is suggested that assignment of KOB to a clear channel much higher in frequency than 770 kc./s. would cut down its coverage area, and also, that only clear channels with class I stations well to the East could be considered.

25. In replying to ABC and the Broadcast Bureau, Hubbard asserts: "To contend, as do ABC and the Broadcast Bureau that the action creating the inequity, i.e., the 1958 amendment of section 3.25 of the rules, must be set aside even though the public interest basis for that action still applies today is to accuse the court of rendering a [266] completely meaningless and futile—even a deceiving—opinion in 1960". The same high public-interest considerations which led to the 1958 decision, it is said, still apply and must govern.

Hubbard maintains that the Commission may not completely ignore the ad hoc 770 kc. proceeding and resolve the KOB/ABC controversy by rewriting the clear channel decision to include 770 kc. in the II-A category, "if, for no other reason, the question of 770-kc.'s allocation status was not litigated in the clear channel proceeding, and the present record in that proceeding will not support any action affecting 770 kc./s. status which is in any way inconsistent with the ad hoc record or the 1958 decision based on that record."

26. Hubbard accuses the Broadcast Bureau of simply seeking an easy way out, ignoring the public-interest considerations mentioned; if the Commission is not up to the job, it should seek a legislative solution to resolve this problem, which, it is said, was of the Commission's own making. It offers what it believes to be a reasonable way of resolving the clear channel breakdown and the KOB-WABC controversy by a rule-making action which could be taken on the present record, "involving neither the extensive new explorations feared by the Bureau nor the due process deficiency so patently present in the simple rewrite approach recommended by both ABC and the Bureau". Briefly, it suggests that section 73.25 of the rules be amended to provide for the alternative assignment on each of 13 channels listed therein of either two class I stations or a class I and class II station (the 13 includes 880 kc./s. and 10 other "II-A" channels, plus 660 and 770 kc./s.). An applicant for a second class I station would be required to submit a plan for directional operation of the existing class I station and a showing that dual class I usage of the channel would better meet the requirements of section 307(b) of the Communications Act than would class I/class II-A usage.

27. The submission of an application for a class I station on one of these channels would lead to an ad hoc adjudicatory proceeding similar to the 1958 770-kc breakdown proceeding, in which the gains and losses resulting from the two types of channel usage could be intelligently compared on the basis of a specific proposal for duplication of the channel, and a realistic determination made as to whether the public interest requires that the new station should be awarded I-B facilities or be limited to a class II station. The nature of each channel breakdown would be justified on its individual merits, the hearing record spelling out the reasons why the different channels might be treated differently. This would eliminate the objections raised by the court of appeals in the 1965 opinion, even though some I-A stations might be treated differently than others.

28. In all probability, states Hubbard, such an approach would eliminate channel inequities among the networks, resulting in "I-B" duplication of the New York City stations of NBC and CBS. In any event, the proceedings concerning the pertinent channels would provide a record on which the commission could justify to the court any different treatment which it might accord the individual stations.[12] [267] It is asserted that consistent with the present rules KOB could and should be permitted to use the facilities specified in its 770 kc./s. application.

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[12]It is also urged that even if this arrangement is not adopted as such, 660 kc./s. could be broken down to use at Phoenix, Ariz., and 1030 kc./s. made available for the station now on 660 kc./s. at Alaska.

Consideration of courses of action

29. Thus, while the commenting parties recognize the inconsistency of the results reached as to 770 kc./s. in the "KOB case" and as to the I-A channels generally in Docket 6741, they differ widely in the approach which should be used to conform the two. ABC would have us treat 770 kc./s. like the other channels broken down in the clear channel decision for II-A stations, and the Broadcast Bureau regards that as an appropriate, and the easiest solution. Hubbard, on the other hand, regards the question of the best usage of 770 kc./s. as established in the 1958 ad hoc KOB decision, and would modify the treatment of some of the other I-A channels, including 660 and 880 kc./s., to provide for the same type of "dual Class I" operation on them, or at least opportunity for consideration thereof in individual adjudicatory proceedings similar to the KOB proceeding concerning 770. Thus, the usage of each of these channels would be determined on an individual basis, on the basis of a hearing record supporting the result reached in light of "307(b)" considerations.

30. In evaluating various approaches, it is appropriate to bear in mind certain basic considerations concerning the Commission's approaches to the assignment of frequencies and stations in the various broadcast services. The Commission discharges its responsibilities under Section 307(b) of the Communications Act of 1934, as amended, to provide "a fair, efficient, and equitable distribution of radio service" in two ways: (1) primarily by rulemaking, pursuant to section 303(f) of the Act; and (2) through individual adjudicatory proceedings designed to choose among a limited number of conflicting applications for stations proposing to serve different communities or areas. In the television

and FM broadcasting services, 307(b) questions usually are resolved at the rulemaking level, and the rules governing these services contain tables of assignments developed pursuant to 307(b) principles to provide for an equitable distribution of service. In contrast, in the standard broadcast (AM) service, class III and class IV stations, and class II stations on the I-B clear channels, are assigned on a "demand" basis, and 307(b) of the Act usually comes into play only when the Commission is called upon to make a choice among two or more technically conflicting applications proposing radio service to different communities. Over the years, this assignment philosophy has resulted in less than optimum distribution of service on the regional and local channels. Indeed, the lessons learned in the older standard broadcast service influenced the adoption of "pre-cut" assignment plans in the newer TV and FM services.

31. In the development of rules to effectuate the purposes of 307(b), the Commission has traditionally given first priority to the provision of some broadcasting service to all of the people in the United States. It is a truism in AM that this aim is not to be achieved for the nighttime hours by the assignment of a great number of stations on each channel, even on a planned basis, and the reservation of clear channels, [268] with dominant stations so operated and protected as to provide wide area primary and secondary service, is an essential element of a nationwide standard broadcast system.

32. For this reason, the "demand" philosophy which has, to a large extent, controlled station assignment practices on other channels has been restricted in its application to the clear channels, particularly to the I-A

channels, and with a few exceptions, the Commission has refused to consider requests by individual stations for the waiver or amendment of rules designed to protect the basic clear channel service, except within the context of an overall rulemaking proceeding, wherein the overall impact of proposed changes can be assessed. The few exceptions typically involve operation by stations other than the I-A's in a manner contrary to the rules, which were originally permitted on a temporary basis because of special public interest considerations, and whose termination or regularization have later become the subject of ad hoc proceedings (WOI/KFI on 640 kc./s., WNYC/WCCO on 830 kc./s., KOB/WABC on 770 kc./s.). In only one of these cases, KOB/WABC, is the basic usage of the I-A channel at issue.

33. The decision of the major 770 kc./s. allocation question was made clear in an ad hoc proceeding, separate from the overall clear channel allocation matter and reaching a different result from that ultimately reached in the latter as to the I-A channels generally, although the KOB decision was consistent with the approach the Commission contemplated in 1958 for general adoption (see par. 10, above). The explanation for this separate treatment is the unique history of the KOB case. The Commission had early recognized that the disposition of this case should be predicated upon the general clear channel decision, and in its public notice of August 9, 1946, included the KOB applications among those placed in the pending file until that decision was reached. The issues in the original clear channel hearing order of February 20, 1945, were sufficiently broad to encompass this question. However, the long delays involved in the clear

channel matter, and the understandable impatience of the parties with the long continued temporary conditions of operation of KOB on 770 kc. culminated in ABC's first appeal to the court. Action taken by the court in effect made it necessary for the Commission to move toward an early KOB decision independently of the clear channel proceeding. Although the clear channel decision was made final in 1962, because of the complications which have been outlined previously the KOB matter is still unsettled.

34. It is clear that we cannot implement in a manner acceptable to the court the basic decision in the KOB/WABC case, proposing dual Class I operation by WABC and KOB on 770 kc./s., without substantially revising the conclusions reached in the clear channel proceeding as to the usage of at least some of the other I-A channels. The question is whether this should be done, or other action taken.

35. The basic allocation decision reached in the KOB/WABC case flowed from an evaluation and balancing of service gains and losses between the stations involved in the case in the pattern of the typical 307(b) adversary standard broadcast proceeding. In contrast, the pattern of I-A use decided upon in the clear channel proceeding resulted [269] from an examination of channel usage in broad perspective, with the effects of proposals for individual channels considered in relationship to proposed usage of all other I-A channels. As a result of this consideration, the Commission decided not to require directionalization of the I-A stations on those channels where provision was made for a second unlimited time station, since such directionalization:

". . . would result in substantial reduction of the existing groundwave and skywave service, with the result that substantial new white areas would be created in which no groundwave service would remain available from any station and that other areas would be reduced in the number of services received from four, three, or two groundwave services to a single groundwave service. In addition, substantial dislocations would obtain of present skywave service which would not be compensated by new operations." (Third notice in docket 6741, FCC 59-972, par. 7)

Directionalizing of all Three New York City I-A Stations

36. It must be borne in mind that an essential element in any resolution of the "KOB problem" which gives KOB a class I or similar mode of operation is *directionalization* by the eastern cochannel class I station so as to protect that operation. In other words, while there would be some gains in KOB's service through giving it greater nighttime facilities without more, the real improvement can come only if the eastern station directionalizes so as to afford KOB a high degree of protection at night, for example to its 0.5 mv./m. 50-percent skywave and 0.5 mv./m. groundwave contours instead of to the 2.24 mv./m. groundwave contour, which is the limit imposed at Albuquerque by WABC's nondirectional operation (25 F.C.C. 691). The court of appeals suggested that the disparate treatment of WABC which it saw in the KOB/WABC decision might be corrected by requiring WNBC and WCBS, the New York City stations of the other networks, to directionalize in a similar manner as that required of ABC's station.

37. Such an approach would, obviously, yield some service benefits in the West. Directionalization of WCBS on 880 kc./s. to protect the station now assigned on that channel on a II-A basis in Nebraska—assuming that that would be the location of the new class I facility resulting—would permit that station to render skywave service and much more extensive nighttime groundwave service, with the likelihood that substantially more people now without any primary service at night would be reached. There is no II-A station assigned to NBC's channel, 660 kc./s.; if a fulltime station were assigned in a Western State it and its area would, similarly, benefit from directionalization of WNBC's antenna. However, such directionalization by all three New York City I-A stations would result in very extensive losses of service in the densely populated northeastern part of the country, depriving large populations of three skywave services and of three groundwave services in the areas west of New York City, where "white areas" might result if the service of all three stations were lost. Such losses in service obviously could not be found to be in the public interest if the sole purpose is to equalize the New York City facilities of the three networks. [270]

38. In the KOB/WABC hearing, the loss of service from WABC occasioned by its directionalization, with the attendant gains in service provided by KOB, was found to be in the public interest in the light of the fact that other stations provided service to all of the areas lost to WABC. This finding would no longer be valid if the existing service were substantially disrupted by the directionalization of WNBC and WCBS. The avoidance of the adverse cumulative effects of separate actions, each of which might be found in the public interest, was one of the primary considerations which

led to the Commission decision, in the clear channel hearing, not to require directionalization of the I-A stations to whose channels second unlimited time stations were assigned.

39. This points up the fundamental defect in the suggestion by Hubbard that the rules be amended to provide for the determination of the usage of each broken-down I-A channel (either dual class I/class I or class I/class II) by individual ad hoc proceedings. This would, if implemented, negate the whole concept of a planned and coordinated evaluation of I-A channels. For instance, a 307(b) determination on an individual basis would require, on each channel, the balancing of population and area gains achieved by operation of the proposed duplicating station as a class I station against corresponding losses sustained as a result of directionalizing the I-A station on that channel. The seriousness of this loss would be assessed in the light of the number of services provided by other stations to the loss area. However, the number of such services will inevitably be affected by decisions made in ad hoc proceedings on the other ten I-A channels subject to duplication. This is particularly true of secondary services available, but it is also true as to primary (groundwave) service where "other services" available include other I-A services, for example, as among the three New York City and four Chicago I-A channels, and others on which the I-A stations are fairly close to each other, such as New York City-Philadelphia and Chicago-St. Louis. Similarly, the full value of the service provided by a duplicating western station as a class I station can only be determined if other services to the Western States are known. But what other services are or will be available will depend on decisions in other ad hoc proceedings.

Because of this interdependence of one proceeding on the others, a joint hearing of applications on all channels in a consolidated proceeding would almost certainly become necessary. Such a hearing, in effect, would constitute a wasteful duplication of effort and a replowing of ground intensively tilled in the clear channel hearing. We therefore, must reject Hubbard's suggestion.

40. There is also to be considered the impact this course of action would have on radio network service. We stated at various times in our consideration of the "KOB problem" the view that provision for equal network facilities, and competitve [sic] equality between networks in their service potential, did not equal in importance the service benefits which would be gained from WABC directionalization. However, it is obvious from the court of appeals 1965 decision that in the view of that court the provision of equal facilities for the "flagship" stations of the three networks is a matter of high importance, not to[271] be cast aside without very strong countervailing reasons. Implicit in this pronouncement, we believe, even though not expressly stated, is the view that radio network service itself is a matter of importance. We ourselves have recently expressed the same view, in considering ABC's request for a ruling and partial waiver in connection with its adoption of a "four network" operation (three AM and one FM networks).[13] If ABC network service is of high importance, there is no reason to believe that the network service of CBS and NBC is less so, and therefore any course of action which would result in loss of *all*

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[13]See *American Broadcasting Companies, Inc.*, FCC 67-1390, 11 F.C.C. 2d 163, 12 R.R. 2d 72 (Dec. 1967), pars. 3-4.

three of these national services to substantial areas and populations is not to be undertaken lightly.[14] This is true even though CBS and NBC, particularly the former,' have both more numerous owned I-A facilities than ABC, and I-A facilities located closer to the areas around New York which would lose service (at Philadelphia and Cleveland, respectively). The decision reached herein—not to pursue a course looking toward directionalization of WCBS and WNBC as well as WABC—is made essentially for reasons concerning the rendition of radio service as such and avoiding long delays, continuing uncertainties and possible disruption of service. But consideration relating to the provision of desirable network service are [sic] an added reason why such a course would not be in the public interest. In this respect, as well as with respect to the provision of radio service, we do not believe that the public interest would be served by reducing several I-A facilities, or at least the two New York City stations, to what is essentially directional I-B status, simply to justify a similar result previously reached as to WABC—adopting a "lowest common denominator" approach to equal treatment—even though the result would be some service benefits in New Mexico and elsewhere in the West.

41. For the above reasons, we do not believe that the basic findings in the clear channel hearing as to the method of use of the duplicated I-A channels should be disturbed, either generally or with respect to the two other New York City I-A stations. Rather, for these and

[14]This is particularly true in light of the tendency in recent years of many radio stations (other than those network-owned) to operate without presenting any substantial amount of network programming.

other reasons, we are of the opinion that the proper and logical step at this juncture is to propose amendment of Section 73.25(b) of the rules to include 770 kc./s. as one of the channels which will accommodate a class I and an unlimited time class II station, in this instance in the State of New Mexico, in other words, essentially to retain existing operations in the status quo.

Need For Service in the Southwest; Compliance With the Court's Mandate

42. We are persuaded that this action, simply regularizing the status quo, can appropriately be taken despite the conclusion in the separate KOB/WABC hearing that the provision of a class I facility for New Mexico, even at the expense of a substantial loss of service from WABC, was in the public interest. The court of appeals stated that the Commission should, early in its further consideration of this matter, make [272] a new assessment of the public interest needs of the Southwest, in light of new and perhaps changed conditions; if it is concluded that a class II station (as KOB presently operates) would meet these needs, the problem is resolved. As we have mentioned above, a cursory review shows that grants of new facilities on other channels since 1958 have afforded service to only a few thousand of the population which KOB would serve as a class I but not as a class II station, and therefore, as far as AM service is concerned, the needs in the area have not substantially lessened since 1958. We assume for present purposes that this is true and would be substantiated by a more intensive exploration.

43. This is not, however, a need that must be satisfied at whatever cost. Within the four corners of

the KOB/WABC hearing the need was found to be sufficiently great to justify its satisfaction at the expense of a substantial curtailment of the existing service of WABC. However, because of the court's remand, the decision in this matter cannot now rest within the confines of the ad hoc proceeding, but must be sought in relationship to the clear channel hearing. In this larger context, the KOB case, as an allocation problem, loses its uniqueness. In every case where a second unlimited time station was assigned to a I-A channel in the clear channel proceeding, the directionalization of the I-A station would have resulted in the new station providing service over a much greater area than would otherwise be the case. A channel by channel comparison of the gains in service achieved by each new station against the losses in service from the I-A station under these conditions would have led, on at least some of the channels, to an indicated result similar to that reached in the KOB/WABC case. The Commission fully realized this, and its 1958 further notice of proposed rule making in docket 6741 (par. 10, above) proposed dual class I operation on five of the I-A channels. Upon further consideration, however, it was determined that the service gains achieved by operating the duplicating stations on a class I basis were not sufficient to justify the cumulative disruption of existing skywave and groundwave service from the I-A stations which would result from their directionalization. Accordingly, the clear channel decision provided only for class II operation by the duplicating stations.

44. As mentioned, the course which Hubbard urges, and which the court of appeals appeared to regard as an appropriate approach, would involve a very substantial loss and disruption of existing service, a

re-structuring at least in substantial part of the Clear Channel decision and a result at variance to that decision and the principles underlying it. We also point out that—aside from the very substantial question as to whether any such result would be in the public interest—there is the matter of the extensive delay, for an extended period, which would be involved before such a reallocation could be effectuated. There is nothing in our experience with the "KOB case" or other AM matters (e.g., the matter of new class II-A assignments) which indicates that class I status for KOB, on a basis consistent with the court's decision, could be attained in less than five years, and the time involved might well be much greater. It is not to be supposed that NBC or CBS, to name only two of the other I-A licensees potentially involved, would be any more acquiescent to directionalization than ABC has been. Dur(273)ing this extended period there would be continuing uncertainty as to what the ultimate effect on other assignments might be, for example the fate of the new class II-A assignment on 880 kc./s. in Nebraska. This is certainly not to be desired.[15] We do not now

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[15]This II-A assignment is now occupied by Station KRVN, Lexington, Nebr., not yet so operating. If 880 kc./s. were broken down on a dual class I basis, this station might become a class I but it is not clear that that would be the optimum use of the western class I assignment, since it would mean two class I stations in Nebraska and three in the 500 miles between Omaha and Denver. If 880 kc./s. were used elsewhere, another frequency would have to be found for the Nebraska II-A assignment, which might be difficult since 770 kc./s. would be used by KOB and thus not available. This illustrates the complexities involved. In 1967 we expressed the importance of quick activation of this assignment, to bring a first nighttime primary service to some 159,000 persons, greater than the population which KOB would similarly serve as a class I but not as a class II station. *Nebraska Rural Radio Association, Inc.*, 10 F.C.C. 2d 345, 11 R.R. 2d 436 (1967).

believe it appropriate to embark on a course involving these burdens, all in pursuit of something which is contrary to what we have already decided is the best use of the clear channels and which, ultimately, we might well decide could not be justified in the public interest.

45. Hubbard, of course, has here and previously urged its "equities" in this matter—that, since the Commission had once accorded class I status to KOB, it is obligated to provide KOB with an operating assignment consistent with that status. The Commission has heeded these urgings, not as such but because considerations of improving radio service in the Southwest indicated the same course of action, and has made every reasonable effort to do just this. At this juncture, however, we are faced with a situation in which the approaches toward achieving this end lead inevitably to a restructuring at least in part, of the clear channel decision, involving both loss of existing service and further expense, delay and uncertainty. This is a price which is not worth the benefit. The assignment principles established in the clear channel decision were adopted only after a most intensive and comprehensive examination of various alternative plans for usage of the clear channels. That these principles should be compromised solely for the purpose of making possible the implementation of an allocations decision which is inconsistent with them, is, in our view, clearly contrary to the public interest.[16]

[16]On the subject of KOB's equities, the Court has said: "The circumstance that KOB had, prior to 1941, a class I-A status is hardly persuasive when it has had only a class II status since that time, and when WABC has always had that status and has up to the 1958 decision been licensed to operate as a class I-A station on an exclusive clear channel basis on 770 kc., the channel in question." (345 F. 2d 959, 4 R.R. 2d 2012).

46. In any event, neither KOB nor the public interest will be ill-served by its permanent assignment to the channel 770 kc./s. with a II-A classification. Operating with a power of 50 kilowatts, day and night, on a basis which will protect WABC's present operation, KOB can serve extensive areas and populations. The conditions for groundwave propagation on 770 kc./s. are considerably more favorable than on 1180 kc./s., the channel on which KOB operated unduplicated as a class I station for a brief period, and the primary service KOB would provide on 770 kc./s. as a class II-A station approaches that which it delivered on 1180 kc./s. in its class I status. While KOB will have no secondary service as a II-A station, this lack should not appreciably affect the viability of its operation.

47. We do not believe that our proposed action is inconsistent with the conditions of the court's remand; these cases were remanded to the[274] Commission "for further proceedings not inconsistent with this opinion." The higher court found error in the "self-apparent" inequity in the treatment of WABC, which it found unsupported by adequate public interest reasons in the decisions in docket 6584 and docket 6741. It is evident that any further order disposing of the KOB/WABC problem must rectify the error. The procedure which we propose will lead to that result. We do not believe that the court meant to, even if it properly could, require that the Commission continue to seek the same basic solution for the problem. Indeed, we were invited to "make a fresh assessment of the needs of the Albuquerque area in respect of KOB in the light of the increased service then being made available, *and other changed conditions.*" *(Underlining* supplied.) In a sense one change in conditions resulted

from the action by the Court itself—the delineation in its 1965 remand of the nature of its requirement for equitable treatment of WABC. This requirement precludes' the solution of the KOB-WABC problem in a limited adjudicatory proceeding, and necessitates its consideration in relationship to the pattern of channel usage set by the decision in the clear channel hearing. As a result of this consideration, we have arrived at a solution at variance with that adopted in the 1958 decision. While the reasons we do not now propose class I facilities for KOB are not those which the Court suggested we explore, we believe they are legally sufficient to support the proposed action, and in our tentative view the decision we reach based thereon—maintenance of the status quo with KOB as a class II station on 770 kc./s.—is what will best serve the overall public interest.[17]

48. We also emphasize that the decision tentatively reached herein is not adopted because it serves "administrative convenience" or is "an easy way out", which Hubbard claims to be the motivation of the Broadcast Bureau in its suggestion. The Commission and its staff have many problems and duties and these have certainly not decreased in recent years; but considering directionalization on one or two other I-A channels in addition to 770 kc./s. would not be an insuperable burden. We are persuaded, rather, by the overall burden

[17] In mentioning the court's mandate as one of the controlling factors in our decision herein, we do not say that we would have reached a different result in the absence of any court pronouncement. Had consideration of 770 kc./s. proceeded *pari passu* with that of the other I-A channels in docket 6741—which we initially attempted in 1946 to do—the result might well have been to reach the same decision as to duplication by a class II-A instead of a class I station.

to the various parties who would be actually or potentially involved—in terms of delay and uncertainty—and thus to the public and the cause of prompt improvement in radio service in other areas, all in the interest of reaching a result which, if not maintenance of the status quo, would be at most a gain in service in the Southwest (to a population which is not extremely large) at the expense of disruption of existing service in the East. The potential gain is simply not worth the cost.

49. We have reached the foregoing conclusions with respect to the approach suggested by the court of appeals and urged by Hubbard—that KOB might be accorded class I status on 770 kc./s. and similar arrangements reached on 660 and 880 kc./s. Another conceivable[275] approach, urged often in the past by ABC although not presently mentioned by Hubbard, would be to consider some other I-A channel for class I operation by KOB, with the eastern I-A station thereon directionalizing. We find this, likewise, an unattractive alternative, involving as it would the loss of service of whatever other I-A station would be affected and the continuing delays and uncertainties involved, as well as the very considerable uncertainty as to which of the channels should be chosen, in all likelihood making a complex and lengthy proceeding necessary (see footnote 7, p. 261).

The Commission's Proposal

50. For the foregoing reasons, we propose to resolve the "KOB problem" by rule amendments simply removing note 3 from section 73.25(a), and adding 770 kc./s. to the list of channels specified in section 73.22, on which fulltime operation by class II-A

stations is provided for, with the II-A assignment thereon in New Mexico.

51. We recognize that the approach mentioned varies from conclusions reached earlier as to the need for improved AM nighttime primary and secondary service in the Southwest, a need which, as far as AM service alone is concerned, does not appear to have changed substantially since the KOB decision. We are also aware that Hubbard and previous licensees of the station have lived with the "KOB problem" for more than a quarter of a century, and it appears conceivable, even though not likely, that Hubbard could present a counter proposal meriting exploration not only in light of the improvement of service in the Southwest but taking into account all of the other considerations mentioned. If such a proposal is presented, it will be given the consideration it appears to warrant.

52. In view of the foregoing, IT IS ORDERED, pursuant to sections 4(i), 303(r) and 307(b) of the Communications Act of 1934, as amended, that docket 6741, *In the Matter of Clear Channel Broadcasting in the Standard Broadcast Band*, IS REOPENED ONLY FOR CONSIDERATION OF THE MATTERS MENTIONED HEREINABOVE, i.e., amendment of sections 73.25(a) and 73.22 of the Rules to specify 770 kc./s. as a I-A channel on which a class II-A station in New Mexico (KOB) may be assigned, and whatever counter proposals concerning the mode of operation of KOB, on 770 kc./s. or as a class I station on another channel, may be presented.[18]

[18]We note in this connection the pendency of Hubbard's application for the facility of WABC, filed in opposition to that station's application for renewal of license and proposing to [footnote continued]

53. Pursuant to applicable procedures set out in section 1.415 in the Commission's rules, interested parties may file comments on or before June 9, 1969, and reply comments on or before July 9, 1969. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in the proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this notice. [276]

54. In accordance with the provisions of section 1.419 of the rules, an original and 14 copies of all written comments, replies, pleadings, briefs or other documents shall be furnished to the Commission.

55. As noted in paragraph 13, above, KOB now operates with 50 kw. at night, directionalized at night on a basis which would protect WABC if it operated directionally also as contemplated by our 1958 and 1963 decisions, but does not protect WABC's present nondirectional nighttime skywave service to the extent class II stations are usually required to do so. This operation will be permitted to continue pending resolution of the present rule making proceeding;

directionalize the New York station in a manner consistent with our earlier decision, so as to accommodate dual New York City-Albuquerque class I operation. If the rules are adopted herein as proposed, it will of course be without prejudice to whatever later actions appear appropriate in connection with consideration of these applications.

whatever action with respect to it is necessary will be considered later.

FEDERAL COMMUNICATIONS COMMISSION*

/s/ Ben F. Waple

Ben F. Waple
Secretary

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur on the result reached because I see no other reasonable alternative. We found at an earlier stage that the public interest would be served by authorizing KOB to provide service to a wider area by operating as a Class I-B station. In reaching that conclusion, we held – based on our long familiarity with network operations – that the benefits of such a result would overbalance any adverse impact on the ABC Radio Network,[1] since the network really depends for its circulation on many local affiliates throughout WABC's coverage area, rather than on the latter station itself. The Court disagreed with our judgment and foreclosed that option.

The Court suggested that we review the situation in the Southwest to see if the service we had authorized

[1] ABC now operates *four* radio networks. WABC serves as the flagship station for only one of them. The others operate with no such basic I-A service.

KOB to provide was still needed. We have done so and find no significant change, so that restricting KOB's coverage as we now do will still leave part of that need unsatisfied. The Court also suggested that we consider the possibility of reducing WCBS and WNBC to Class I-B status, thus achieving parity among the networks by leaving them all with directionalized stations in New York City. I do not think such action would impair the viability of either the CBS or NBC Radio Networks, but agree that this obliteration of I-A service in New York City would probably create new nighttime white area. This course therefore seems unsound.

I also agree that we would get nothing – except uncertainty – out of a general reopening of docket 6741 to review once more the possibility of putting KOB on another frequency.

Having exhausted the possibilities, we are left with a "solution" which I regard as less in the public interest than the one which the Court overturned, but it is the least objectionable of the courses now available to us.

APPENDIX F

[59 FCC 2d 32]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 76-371
40256

In the Matter of	)	
	)	
Clear Channel Broadcasting in the Standard Broadcast Band (KOB/WABC)	)	Docket No. 6741
	)	

REPORT AND ORDER
(Proceeding terminated)

(Adopted: April 21, 1976; Released: April 30, 1976)
By the Commission: Commissioners Washburn absent.

1. On April 22, 1969, we reopened the captioned clear channel proceeding for the limited purpose of establishing permanent nighttime operating modes for radio stations KOB (AM), Albuquerque, New Mexico (770 kHz, 50 kW, DA-N) and co-channel class I-A WABC(AM) in New York City (770 kHz, 50 kW, nondirectional day and night). *Notice of Proposed Rule Making*, 17 FCC 2d 257. The proposal was duly published in the Federal Register of April 29, 1969 (34 FR 7033). Both licensees are on deferred renewal status awaiting the outcome of this proceeding.

2. By Notice of Inquiry and Proposed Rule Making released December 12, 1975 (FCC 75-1331; Docket 20642), we opened a new clear channel proceeding to consider the possible nighttime duplication of presently unduplicated U.S. I-A clear channels, the further duplication of presently duplicated U.S. I-A clear

channels and, alternatively, the reservation of certain U.S. I-A clear channels for "super-power" operation in order to improve nighttime skywave service to remote regions of the country now lacking interference-free primary service from any aural broadcast source. However, because of the protracted history of litigation involving the frequency 770 kHz and the fact that a series of court decisions has severely narrowed the range of options available to us in resolving the "KOB problem," we decided to deal with it separately and at an early date. Footnote 1, page 2, FCC 75-1331.

Background

3. The "KOB problem" originated in 1941, when it became necessary to find another frequency for KOB, then assigned to 1180 kHz as a clear channel station. This grew out of the implementation of the first North American Regional Broadcasting Agreement (NARBA), effective in March 1941, which triggered a number of frequency shifts in the United States owing to the creation of new Mexican clear channel priorities. No comparable assignment on another channel could be found, and KOB was summarily assigned to 1030 kHz, a I-A clear channel on which the dominant station is WBZ, Boston. Despite the distance between Boston and Albuquerque, KOB's operation on 1030 kHz proved to be technically unsatisfactory, due in part to the west[33]ward orientation of WBZ's directional antenna system and resulting extensive nighttime skywave interference between the two stations.

4. In November 1941, KOB was shifted to 770 kHz, a I-A channel on which the dominant assignment is now WABC (American Broadcasting Companies, Inc.), but which at that time was a Blue Network outlet for the

National Broadcasting Company (WJZ). KOB has operated on 770 kHz ever since. Initially, KOB's occupancy of 770 kHz was authorized under a special service authorization (SSA) which specified a power of 50 kW day and 25 kW night, nondirectional. This caused considerable skywave interference to WABC during nighttime hours. In 1944, KOB filed an application (File No. BMP-1738) in which it sought to regularize its operation on this basis, and a hearing thereon was held in January 1945. No decision was reached at that time because in February 1945 we instituted the first clear channel proceeding, which sought to define dominant and secondary uses on all of the 25 I-A frequencies reserved for clear channel use in the United States.

5. In 1946 the KOB application, along with others relating to the U.S. I-A clear channels, was placed in pending status awaiting the outcome of the clear channel proceeding. KOB's SSA operation on 770 kHz was continued on an interim basis. In 1950, WABC appealed from our extension of KOB's interim operation, and in 1951 the U.S. Court of Appeals held the longstanding interference to WABC, without hearing, to be improper, and directed us to find a permanent solution. Accordingly, the KOB application was removed from pending status, but the SSA remained in effect. WABC protested this continuation, and a hearing on its protest was held in 1953. In July 1955 we denied the WABC protest. WABC appealed again, in response to which the Court, in 1956, directed us to take immediate steps to remove the interference to WABC. By letter of November 8, 1956, we directed KOB to submit a directional antenna pattern for temporary nighttime operation on 770 kHz, in

compliance with the Court's mandate. KOB did so, and commenced directional operation in April 1957 with a two-element array, in effect becoming a class II (or secondary) station on the clear channel 770 kHz, protecting the dominant class I station (WABC) to its 0.5 mV/m 50% nighttime skywave contour.

6. In a wide-ranging decision adopted September 3, 1958 – 25 FCC 683 (1958) – we gave in-depth consideration to the long-pending KOB application (paragraph 4, *supra*), as well as to a variety of possible alternative modes of operation at both stations against a backdrop of populations and areas gained and lost, programming and network affiliations, and apparent inequities in the historic distribution of class I facilities in the United States. The reversion of KOB to its licensed frequency (1030 kHz) was ruled out for a variety of reasons, including the high RSS limits which would be imposed on its nighttime operation by co-channel I-A WBZ, Boston and, potentially, by a co-channel class II fulltimer in Mexico City (XEQR). Finally, we found that KOB, operating as a class I-B station on 770 kHz along with WABC, would provide a first nighttime primary (groundwave) service to 118,000 more people in the relatively underserved Southwest than it would if operated as a class II (secondary) station fully protecting WABC. KOB was granted leave to amend its application to specify nighttime direc[34]-tional operation in accordance with theoretical parameters contained in the decision, and WABC was granted leave to file a parallel application to directionalize its nighttime operation.

7. WABC appealed the 1958 decision, and a 1960 Court decision affirmed but with reservations. *American Broadcasting-Paramount Theatres, Inc. v. FCC.* 280 F.

2d 631. Specifically, the Court stated that WABC should not be precluded from a hearing on its claim that some eastern broadcaster other than ABC should bear the burden of accommodating KOB. The Court also stressed that ABC's position as a network should not be prejudiced by forcing it to share its clear channel if other networks retained on their clear channels greater protection (i.e., WNBC and WCBS, both I-A clear channel stations in New York City on 660 kHz and 880 kHz, respectively). Finally, that Court expressed the view that we should, in still another proceeding, seek to provide facilities for ABC comparable to those of the other networks. In a related development which occurred early in 1960, KSTP, Inc., the then-licensee of KOB, filed a competing application (File No. BP-13,932) for 770 kHz in New York against the then-pending WABC renewal application (File No. BR-167), specifying the nighttime directional parameters we had prescribed for WABC but which WABC had failed to request. Both applications are still pending.

8. In light of these developments, we ordered, in 1961, a further hearing on issues designed to determine whether the result reached in 1958 should be altered on the basis of parity among radio networks, as suggested by the Court. In our decision in this matter, adopted July 3, 1963 – 35 FCC 36 – we conceded that to require WABC to directionalize during nighttime hours while WCBS and WNBC were permitted to operate nondirectionally would leave ABC with a facility in New York inferior, from the standpoint of coverage, to those of NBC and CBS. We concluded, however, that ABC had failed to translate comparative inferiority in station coverage into a competitive inferiority of the ABC radio network vis-a-vis NBC and CBS. This

conclusion rested in part on our finding that the outlying secondary (nighttime skywave) service area which would be lost to WABC as a result of nighttime directionalization was already 99 percent served by ABC-owned WLS, Chicago, and 65 percent served from ABC affiliate KXEL, Waterloo, Iowa, both clear channel stations, and that ABC had failed to quantify its allegation that the nighttime directionalization of WABC would affect network time-buying practices as to the ABC radio network. We therefore granted KOB's application for class I directional nighttime facilities in Albuquerque and denied WABC's application for nondirectional renewal in New York, without prejudice to reconsideration "... if ABC files, within 30 days of the release date hereof, an application for modification of facilities on the frequency 770 kc in conformity with parameters specified in paragraph 22 of the September 1958 decision ..."[1] The effect of this decision, insofar as KOB was concerned, was to [35] transform it from the temporary class II-A status mandated by the Court in 1956 to a *de facto* class I-B station[2] which would protect WABC to its 0.5 mV/m

[1] Our 1963 decision also made passing reference to the Clear Channel Decision of 1961 (31 FCC 565 (Docket 6741)) which, although not determining optimum modes of operation on 770 kHz, did conclude that the public interest required a major fulltime station in New Mexico; that 770 kHz was much preferable to 1030 kHz for this purpose; and that other alternatives should not, and indeed could not, be considered. The rules were amended to accommodate the assignment of two class I stations on 770 kHz in a manner to be determined. With respect to NBC and CBS, provision was made for permanent nighttime duplication of their clear channels in Alaska and Nebraska, respectively, but without altering their existing I-A nondirectional modes of operation.

[2] With class I-B facilities but not receiving the degree of nighttime protection normally accorded to class I-B stations.

50% skywave contour, but only if the latter station directionalized its nighttime signal to suppress radiation toward Albuquerque. On July 3, 1963, we granted an appropriately modified construction permit (BMP-1738), and on October 25 of that year, KOB commenced operation as a *de facto* class I-B assignment on 770 kHz (50 kW, DA-N) under program test authority of equal date. The station is presently operating with these facilities.

9. Predictably, ABC did not file a directional nighttime proposal as contemplated in our 1963 decision. Instead, ABC appealed once again. A decision on that appeal was rendered by the United States Court of Appeals (D.C. Cir.) on February 25, 1965, in *American Broadcasting-Paramount Theatres, Inc. v. F.C.C. et al.*, 345 F.2d 954, 4 RR 2d 2006, in which the Court again addressed the underlying issues in the case. In reversing our 1963 decision to give KOB class I-B status and remanding the case for further proceedings, the Court made the following observations:

(a) WABC, as ABC's radio network "flagship" station, was treated very differently from WNBC and WCBS in our 1961 Clear Channel Decision in that it remained classified as a Class I-B station, was required to share its channel with another class I-B station (KOB), was required to protect that station, and did not receive the same degree of interference protection as the other two network "flagship" stations.

(b) Operating with nighttime class I-B facilities, WABC's primary (groundwave) nighttime service area would be reduced to the extent of 3,680 square miles and some 702,326 persons, and secondary (skywave) service to approximately 17 million people would be lost.

(c) WABC would be required to incur a substantial capital outlay, might be compelled to acquire a new transmitter site, might be unable to obtain airspace clearance from the FAA, and would in any event be precluded from future consideration for higher power.

(d) ABC's failure to sustain the burden of proving that its overall competitive position would be damaged by down-grading WABC to a class I-B facility was irrelevant "... because it is not within the scope of [the Court's] 1960 opinion, which indicated that comparable channel facilities should be provided for all networks."

(e) Our 1963 decision, based in part on technical findings elicited in the 1958 proceeding, may have been overtaken by events or otherwise rendered obsolete.

The main thrust of the Court's opinion was that WABC is entitled to "equitable channel treatment" vis-a-vis the "flagship" stations of the other two major networks." While concurring in our oft-expressed technical judgment that 770 kHz is the most suitable permanent frequency for KOB, the fact that KOB was a class I station on 1180 kHz prior to [36] 1941 did not, in the Court's view, confer equities which should in the long run differentiate it from conventional class II fulltimers assigned to the WNBC and WCBS clear channels.

10. We then sought both clarification of the Court's mandate and certiorari from the Supreme Court. Both requests were denied. On July 19, 1965, we issued a *Memorandum Opinion and Order* reopening the Clear Channel proceeding for the reception of supplemental

evidence to up-date the need for additional AM broadcast service in the Southwest. 1 FCC 2d 326. The *Memorandum Opinion and Order* also contained issues going to the relationship of the projected WABC loss area to ABC's network revenues and ABC's competitive position vis-a-vis the CBS and NBC radio networks within the projected WABC loss area. We acknowledge, however, that the Court's decision pointed to a class II status for KOB if such a station "... would now adequately meet the needs of the Albuquerque area."

11. Further action was withheld because of a proposed ABC/ITT merger which, it appeared, might lead to a voluntary settlement of the case. This prospect vanished, however, following intervention by the Department of Justice and withdrawal of the transfer application in 1968. In the meantime, and in response to our solicitation of the views of all parties to the dispute, we abandoned earlier efforts to resolve the matter through the adjudicatory process, and decided that the issues raised by the court's 1965 remand "... can most appropriately be resolved at this juncture through rulemaking ..." *Memorandum Opinion and Order*, 4 FCC 2d 606 (1966). The KOB and WABC applications which had figured in earlier judicial appeals were accordingly removed from hearing status, to be held in abeyance pending further order of the Commission.

The 1969 Proposal

12. In the Notice of Proposed Rule Making which followed (paragraph 1, *supra*), we recognized that to give KOB permanent class I-B status in Albuquerque and still comply with the principle of "equitable channel treatment" of WABC, as mandated by the

Court, would involved the restructuring, at least in part, of our 1961 Clear Channel Decision and the overall plan of class I-A/II-A channel sharing reached therein, along with further expense, delay, and uncertainty which would end with massive and unacceptable reductions in nighttime coverage presently provided by eastern class I-A clear channel stations. This, we concluded, was a price not worth the benefit. Accordingly, we proposed to resolve the "KOB problem" by amending sections 73.22 and 73.25 of our rules to provide for fulltime operation by a class II-A station on 770 kHz in New Mexico, the effect of which would be to reconvert KOB to a class II-A operation similar to the one conducted between 1957 and 1963. KOB's *de facto* I-B nighttime mode of operation, which as previously noted does not provide as high a degree of protection to WABC as class I-A stations are normally entitled to, was continued pending outcome of rulemaking.

Comments Filed in the Proceeding

13. Comments, reply comments, and other pleadings were filed in this proceeding by the following parties: [37]

(a) WEW, Inc., (WEW), licensee of co-channel daytime station WEW, St. Louis, Missouri.

(b) KXA, Inc., (KXA), licensee of co-channel limited-time station KXA, Seattle, Washington.

(c) American Broadcasting Companies, Inc. (ABC or WABC), licensee of class I-A station WABC in New York City.

(d) Hubbard Broadcasting, Inc. (Hubbard or KOB), licensee of station KOB, Albuquerque, New Mexico.

14. WEW, a daytime station on 770 kHz operating with a power of one kilowatt, is one of the oldest AM broadcast stations in the country. It is presently affiliated with ABC's American Entertainment Radio Network. The licensee's efforts over the years to obtain nighttime hours of operation have been unsuccessful, principally because of the protected I-A status of WABC. Citing our commitment in the 1961 Clear Channel Decision to consider the further nighttime duplication of channels once-duplicated in that proceeding, WEW seeks to use this proceeding as a vehicle for once again proposing its own nighttime operation. Specifically, WEW proposes that KOB and WABC both operate as class I-B facilities, as contemplated in our 1958 decision, and that the rules be amended to permit a "mid-point" class II (secondary) operation on 770 kHz in Missouri. Such an operation, if sharply directionalized north and south during nighttime hours would, according to WEW's engineering consultant, fully protect KOB and WABC if those stations were operated as class I-B facilities. Operating as proposed on 770 kHz (50 kW, DA-2), WEW would provide a first nighttime primary ("white area") service in a portion of Ozark Mountains region not served by nondirectional clear channel station KMOX, St. Louis, owing to low soil conductivity in the area.

15. KXA, a limited-time class II station on 770 kHz, operates essentially daytime hours with a power of one kilowatt. Like WEW, KXA has repeatedly attempted to obtain nighttime operating authority. These proposals have been consistently rejected, first because of a World War II "freeze" on the acceptance of new and major change applications, and later because they became entangled in the clear channel protection principles

underlying the 1961 Clear Channel Decision. Operating as proposed (50 kW, DA-2, unlimited hours), KXA would protect the day and night primary and secondary service areas of WABC and the primary (groundwave) service areas of KOB, assuming the latter station to be operating as a class II-A facility. In so doing, KXA would provide a second primary ("gray area") service in an area of about 8,000 square miles and a first primary ("white area") service in an area of about 1,100 square miles. Finally, KXA points to the curtailment of its presunrise operation growing out of our 1969 rulemaking decision in Docket 17562 *et al*, in which a power ceiling of 500 watts was imposed on all PSA operations – 18 FCC 2d 705 – [3] and attempts to show that its existing daytime use of 770 kHz effectively precludes the efficient fulltime use of that frequency elsewhere in the Northwest. [38]

16. ABC views KOB's presence on 770 kHz as an "encroachment" hastily ordered on a "temporary" basis in 1941 to meet NARBA frequency shift deadlines. This use, ABC observes, was continued through the war years because of a wartime "freeze" on construction, thereafter becoming entangled in clear channel rulemaking from which it never really emerged. The end result, ABC contends, is that among the 25 I-A clear channels reserved by treaty for use in the United States, 770 kHz alone has been singled out for class I-B station duplication; that this "solution" has been branded by the Court as prejudicial to ABC's interests vis-a-vis the

[3] On September 16, 1969, the 500-watt PSA power ceiling was stayed as to KXA and certain other western class II daytime and limited-time stations pending reconsideration of the 1969 rulemaking. Accordingly, KXA has continued to operate during the pre-sunrise hours with its authorized daytime power of one kilowatt.

other two major networks and removes WABC as a candidate for "super-power" at some future time[4]; that if WABC is ultimately compelled to directionalize, it will lose almost 18,000,000 potential listeners to its nighttime skywave service; that a loss of this magnitude cannot be outweighed by the need for additional nighttime primary service in New Mexico[5]; that under the I-A/II–A dichotomy applying to other duplicated I-A clear channels, WABC is entitled to nighttime protection to its 0.5 mV/m 50% skywave contour; that to place all U.S. class I-A stations on the same footting by adopting a lesser degree of protection across the board would produce massive skywave dislocations in the East which would run counter to the basic rationale of the Clear Channel Decision; that Hubbard, having acquired KOB in 1957 subject to the outcome of the instant litigation, has no "overpowering private equities" in 770 kHz beyond what might be asserted on any other U.S. I-A clear channel; and that in the Notice in this proceeding we decisively rejected the assertion of such equities based on channel-by-channel analyses of I-A frequencies whose usage has already been settled in the Clear Channel Decision. In short, ABC contends that the past holdings of the Court, as well as the basic conclusions reached in the Clear Channel Decision and tentatively reaffirmed in the Notice in this proceeding, require that WABC continue as a non-directional class I-A station, and that KOB be relicensed as a class II-A

[4]The same impediment to expansion, however, would appear to apply to most of the 13 currently duplicated I-A channels.

[5]ABC observes that of the 25 million people in the continental United States who receive no primary (groundwave) AM service during nighttime hours, 18 million live east of the Mississippi River and depend primarily on eastern clear channel stations like WABC for nighttime skywave reception.

station affording the *same* degree of protection to WABC as other class II-A stations provide to the dominant clear channel stations on their frequencies.

17. The comments filed by KOB endorse the past findings of the Commission in this matter and hence are confined, in large measure, to a critical analysis of the Court's reasoning in remanding the case in 1965. KOB's position may be fairly summarized as follows: our 1969 Notice in this proceeding, which looks toward a II-A status for KOB, represents a retreat from earlier judgments, reached in 1958 and 1963, that the public interest would best be served by class I-B facilities in New York and Albuquerque on 770 kHz; that operating in this manner, KOB would bring a first primary AM service to 98,000 people in a 34,500 square-mile area and a second primary AM service to 9,000 persons in a 1,330 square-mile area; that the massive reduction in WABC's secondary (skywave) service area which would result from its nighttime directionalization is not significant because the loss area is[39] served by 18 to 20 other secondary services; that based on an analysis of WABC's programming compiled from 1968 composite-week renewal data and off-air monitoring, WABC's pretensions to network "flagship" status are invalid because the station is operated ". . . primarily and almost exclusively as a local New York City station for the benefit of New York advertisers . . ."; that this conclusion is reinforced by the fact that the carriage of network programs accounts for only 8.5 percent of WABC's composite week as against 20 percent for WCBS, 22 percent for WNBC, and 36 percent for KOB (an NBC network affiliate); that in any event radio network operations are no longer a significant factor in the mass media field and hence should not be a

consideration in AM allocations decisions; that in contrast to WABC, KOB has ". . . endeavored to preserve its pattern of programming for regional and wide-area coverage"; that for all these reasons, WABC should be compelled to directionalize during nighttime hours, preferably at sunset, New York, but at least no later than sunset, Albuquerque; and that such directionalization, twice ordered by the Commission, can be accomplished by WABC's present transmitter site at a probable cost of less than $50,000.

18. Reply comments were filed in this proceeding by KXA, Hubbard, and ABC. The gist of KXA's reply brief is that if KOB's counterproposal is adopted (i.e., mutually protected class I-B directional facilities for KOB and WABC), KXA could design a 5 kW nighttime array which would fully protect the secondary service contours of both KOB and WABC and, in the process, serve a new area of 1,037 square miles with a population of almost one million. KXA also renews its request that the rules be amended to accommodate a class II unlimited-time station on 770 kHz in Seattle. Hubbard, up-dating earlier allegations that WABC fail to carry programming of interest to listeners outside the New York metropolitan area, submitted for inclusion in the record the community ascertainment showing filed by WABC in 1969 in connection with its long-deferred license renewal application. ABC reiterates the massive nighttime skywave signal loss which would occur if WABC and/or the other two network "flagship" stations were required to directionalize, but fails to address Hubbard's recurring argument that no one is listening and that, in any event, WABC's programming is oriented only toward the needs and interest of the New York metropolitan area. ABC also condemns as "premature" the efforts of WEW and KXA to "muscle

into" the instant proceeding, which it views as being restricted to the purpose of implementing the outstanding mandates of the court. In a "Petition to Enlarge Scope of Proceedings," supported by KXA and opposed by ABC, WEW again urges that consideration be given, within the context of this proceeding, to the possibility of fulltime operation in St. Louis on 770 kHz.

Analysis of the Comments

19. While we sympathize with the frustrations endured over the years by WEW and KXA in their efforts to obtain nighttime operating privileges on 770 kHz, their desire to do it within the context of this proceeding must be rejected. To enlarge the present proceeding to accommodate their proposals for fulltime operation would require the issuance of a further notice of proposed rulemaking, thus delaying again the resolution of a problem which is already 35 years old. More[40]over, to do so would transgress the bounds of the Court's 1965 remand order; i.e., the issue of channel equality for WABC vis-a-vis the other network "flagship" stations in New York and the extent to which KOB's nighttime mode of operation would destroy that equality. Because of the manner in which the remand order was drawn, our *Notice* in this proceeding sought only to define the permanent relationship between WABC and KOB. Other licensees on (and prospective applicants for nighttime hours of

operation on) 770 kHz, including WEW and KXA, must await clarification of this relationship before their proposals can be intelligently evaluated.[6]

20. We now proceed to a resolution of the respective priorities of WABC and KOB. This matter is best approached by a brief recitation of those solutions which are clearly *not* acceptable to us or to the Court:

(a) *Reversion by KOB to 1030 kHz.* For technical reasons fully explained in our 1958 and 1963 decisions, and summarized in paragraph 6, *supra*, together with the disruptive effects of such a move on channel assignments made in the western United States on frequencies adjacent to 1030 kHz since the onset of litigation, we find this solution to be unacceptable.

(b) *Shifting KOB from 770 kHz to a frequency other than 1030 kHz.* None of the parties to this proceeding has offered this possibility as a counter-proposal, nor does it appear to be technically feasible. Apart from 770 kHz and 1030 kHz, the only other east coast I-A clear channel even remotely suitable for nighttime duplication in Albuquerque is 1210 kHz, currently assigned to CBS-owned and operated WCAU in Philadelphia. In our 1961 Clear Channel decision, 1210 kHz was earmarked for nighttime duplication in "Kansas, Nebraska, or Oklahoma" and was thereafter assigned to a new class II-A station in Guymon, Oklahoma. This forecloses the nighttime use of

[6] WEW and KXA may, of course, file comments with respect to the possible nighttime duplication of 770 kHz in St. Louis and Seattle in the newly instituted clear channel proceeding (Docket 20642).

1210 kHz in Albuquerque. We therefore conclude that KOB must be permanently accommodated on 770 kHz.

(c) *Achievement of "channel equality" by directionalizing all three network "flagship" stations in New York City.* While apparently acceptable to the Court, we categorically reject this "solution" as contrary to the public interest. It is clear that we cannot order the directionalization of all three stations without hopelessly undermining the rationale of the 1961 Clear Channel Decision as to the function to be served by Class I-A stations generally. We wish to stress that our earlier decisions in the "KOB" case flowed from an evaluation and balancing of service gains and losses between the stations involved, in a manner typical of section 307(b) adversary proceedings in the AM broadcast field. By way of contrast, the pattern of I-A clear channel use decided upon in the 1961 Clear Channel proceeding came from an examination of channel usage in broad perspective, with the effects of proposals for individual channels considered in relationship to the pro[41]posed usage of all other I-A channels. As stated in the 1969 *Notice* in this proceeding

> "... such directionalization by all three New York City I-A stations would result in very extensive losses of service in the densely populated northeastern part of the country, depriving large populations of three skywave services and of three groundwave services in areas west of New York City, where 'white areas' might result if the service of all three stations were lost. Such losses in service obviously could not be found to be in the public interest if the sole purpose is to equalize

the New York City facilities of the three networks.

Thus, as an isolated transaction, we found in 1958 and again in 1963 that the public interest would best be served by "balkanizing" 770 kHz in such a way that needed increments of nighttime groundwave and skywave service could be introduced into New Mexico and portions of surrounding states without disruption to corresponding services provided by the two remaining class I-A clear channel stations in New York City. To sacrifice the latter services on the altar of "channel equality" among networks is too high a price to pay. As already indicated, we reject this approach as contrary to public interest judgments already made in the 1961 Clear Channel Decision.

(d) *Intermixture of class I-A and I-B facilities on 770 kHz.* As indicated in paragraph 8, *supra*, KOB has been operating with a I-B pattern and directional parameters since 1963, anticipating the installation, by WABC, of a companion I-B nighttime directional array in New York City. WABC has, however, continued to operate nondirectionally. KOB does not, therefore, receive the nighttime protection to which class I-B stations are entitled under our rules (0.5 mV/m 50% skywave contour protection). Conversely, KOB is not protecting WABC's 0.5 mV/m 50% skywave contour, which is also the degree of protection which class I-A stations on "duplicated" clears are entitled to receive from class II fulltimers on the same channel. The net result is that during nighttime hours, the interference imposed on KOB by WABC destroys essentially all of what would otherwise be KOB's secondary service area and a substantial portion of KOB's primary service area. KOB, in turn, is destroying WABC's nighttime

skywave service within a crescent-shaped area running through portions of Georgia, Tennessee, Kentucky, Indiana, Illinois, Wisconsin, and Michigan. This area, which encompasses metropolitan Chicago and Milwaukee, contains a population of about 9,500,000 persons within a 39,500 square-mile area.[7] Admittedly, this represents a highly inefficient use of the channel, and if allowed to continue might well preclude the assignment of additional western class II fulltimers on 770 kHz as part of our deliberations in the new Clear Channel proceeding (Docket 20642).[8] To summarize, and although not addressed by the parties, we believe that the permanent continuance of KOB on 770 kHz with its present I-B parameters is both technically unsound and, in [42] view of the above-described impact on WABC's secondary service area, fails to meet the test of "comparatively equal channel facilities" among the major networks, as laid down by the Court in its 1965 decision.

21. Thus, by a process of elimination, we come to the solution recommended in the outstanding *Notice* in this proceeding; i.e., specifying II-A parameters for KOB and thus returning that station to essentially the same nighttime mode of operation as observed between 1957 and 1963. Given the reality of a 50 kW nondirectional nighttime operation by WABC in New York City and the nighttime RSS limitation (approximately 2.2

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[7] This translates into area and population losses of 8 percent and 9 percent, respectively, within WABC's 0.5 mV/m 50% nighttime skywave contour.

[8] This preclusion would occur because KOB would continue to be protected as a class I-B station rather than as a class II-A (secondary) station on the channel.

mV/m) already imposed by WABC on KOB, adjustment of the latter station's directional pattern and operating parameters to meet II-A requirements instead of I-B requirements should not substantially alter the areas and populations it is presently serving.

22. The rationale of this solution was amply expressed in paragraph 46 of the *Notice* which initiated this proceeding:

> "In any event, neither KOB nor the public interest will be ill-served by its permanent assignment to the channel 770 kHz, with a II-A classification. Operating with a power of 50 kilowatts, day and night, on a basis which will protect WABC's present operation, KOB can serve extensive areas and populations. The conditions for groundwave propagation on 770 kHz are considerably more favorable than on 1180 kHz, the channel on which KOB operated unduplicated as a class I station for a brief period, and the primary service KOB would provide on 770 kHz as a class II-A station approaches that which it delivered on 1180 kHz in its class I status. While KOB will have no secondary service as a II-A station, this lack should not appreciably affect the viability of its operation."

23. There have been several developments since the 1965 Court remand which tend to make a "II-A" solution in Albuquerque more acceptable in the public interest than before. In rulemaking proceedings concluded in recent years, we have increasingly come to regard the AM and FM broadcast services as equal components of a single aural broadcast service. In this connection, the following FM broadcast services (all unlimited time) have been established in New Mexico during this 11-year period: KOB-FM, Albuquerque

(93.3 MHz); KPAR-FM, Albuquerque (100.3 MHz); KRST (FM), Albuquerque (92.3 MHz); KUNM(FM), Albuquerque (90.1 MHz); KSVP-FM, Artesia (92.9 MHz); KBAD-FM, Carlsbad (92.1 MHz); KMTY-FM, Clovis (99.1 MHz); KBSO (FM), Espanola (102.3 MHz); KRWN(FM), Farmington (92.9 MHz); KRAZ(FM), Farmington (96.9 MHz); KQNM(FM), Gallup (93.7 MHz); KGLP(FM), Gallup (94.5 MHz); KSCR(FM), Hobbs (95.7 MHz); KPOE(FM), Humble City (94.1 MHz); KASK(FM), Las Cruces (103.1 MHz); KGRD, Las Cruces (103.9 MHz); KEDP(FM), Las Vegas (91.1 MHz); KFUN-FM, Las Vegas (100.9 MHz); KLEA-FM, Lovington (101.7 MHz); KOPE(FM), Mesilla Park (104.9 MHz); KENW-FM, Portales (88.9 MHz); KTDB(FM), Ramah (89.7 MHz); KAFE-FM, Santa Fe (97.3 MHz); KSNM(FM), Santa Fe (95.5 MHz); and KTNM, Tucumcari (92.7 MHz). As a result of these post-1965 service increments, 25.1 percent of the land area of the State now receives one or more primary (1 mV/m) nighttime FM broadcast services, and about 70 percent of the State is provided with 50 uV/m nighttime FM coverage. Significantly, FM stations have been established at seven places within the area which KOB would serve as a protected I-B but not as a class II-A station. [43]

24. Moreover, in *Berrendo Broadcasting Company et al*, 52 FCC 2d 413 (1975), we accepted for filing an application to upgrade the nighttime facilities of class II-A station KSWS, Roswell, New Mexico (1020 kHz) from 10 kW to 50 kW. This proposal, when implemented, will bring a first nighttime primary (groundwave) service to an area of 1,820 square miles with a population about 4,000. Finally, we note that the act of relegating KOB to a II-A status will, in

overall terms, still leave the State of New Mexico in a better position than most western states with respect to nighttime duplication privileges on the eastern I-A clear channels; i.e., apart from the State of Nevada, which has class II-A assignments in Las Vegas and Reno, New Mexico will be the *only* state with *two* class II-A stations. For all these reasons, it appears that at this point in time, a "II-A" solution of the "KOB problem" would comply with our obligation, under section 307(b) of the Communications Act, to "... provide a fair, efficient, and equitable distribution of radio service ..." among the states and communities of the United States.

Other Matters

25. As indicated in paragraph 18, *supra*, ABC fails to rebut Hubbard's persistent argument that WABC's nighttime programming is not responsive to the problems, needs, and interests of the thousands of communities and millions of listeners within the secondary (skywave) service area ABC seeks to protect in this proceeding. By its silence, ABC concedes this to be true. The question then becomes: what significance, if any, attaches to WABC's failure to design programming for communities far removed from the New York metropolitan area and, if such an obligation exists, how would it be discharged? Renewal ascertainment data currently on file indicate that WABC does in fact carry a limited amount of public affairs programming which is responsive to the problems, needs, and interests of communities in northern New Jersey, Connecticut, eastern Long Island, and elsewhere within its primary (groundwave) service area. These efforts must be judged

against the test laid down in the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971), which provides in pertinent part as follows:

> "... An applicant's principal obligation is to ascertain the problems of his community of license. [While] he should also ascertain the problems of the other communities that he undertakes to serve ... no major city more than 75 miles from the transmitter site need be included in the applicant's ascertainment, even if the station's contours exceed that distance."

From the information of record, it appears that WABC is meeting its ascertainment obligation within the 75-mile perimeter, and that insofar as its nighttime skywave service area is concerned, there is no parallel obligation. A different conclusion would, we feel, impose an impossible ascertainment burden on every clear channel station in the country.

26. With respect to "equitable channel treatment" for WABC, as mandated by the Court, KOB asserts that WABC devotes well under 10% of its time to network programs from the ABC Contemporary network (only 5.6% during evening hours in a week in May 1969, with all programs longer than 5 minutes being run between midnight and 3 a.m. on Monday morning); that this is a much smaller percentage of time than WNBC and WCBS devote to their networks' material; that [44] WABC in fact does not carry some ABC Contemporary programs and is not shown to originate any of them; and that network radio, consisting now chiefly of brief newscasts and similar programs, has much less importance in radio and in the mass media than was true in earlier years. In sum, KOB contends that the loss in ABC programming

to the public, and to ABC as a network operation, would be minuscule as compared to the service benefits in the Southwest resulting from true I-B status for KOB.

27. In a *Notice of Inquiry and Proposed Rule Making* recently issued concerning network radio regulation generally (Docket 20721, FCC 76-157, February 1976), we recognized the changes which have taken place in radio, and network radio in particular, since 1941 when our network rules were adopted. However, we do not find in these developments, or in the characteristics of ABC's and WABC's current operations urged by KOB, reason why the concept emphasized by the Court is no longer valid. Networks are important in radio as sources of national news and other informational material, and we have repeatedly recognized in recent years both this importance and, in view of the economic problems such radio operations face in the "television era", the importance of permitting experimentation and innovation. See, for example, *National Broadcasting Company, Inc.*, 55 FCC 2d 59 (1975). While WABC itself is directly involved in the carriage of material for only one of ABC's four networks, and is not in this sense a "flagship" with respect to the other three, we believe it appropriate to look at the situation in a more general sense, in line with what we regard as the Court's concern – ABC as one of three network companies owning radio facilities in the country's largest market as well as in other places, and the desirability of putting these facilities on an equal footing instead of taking affirmative action which would unbalance them. The net loss to WABC through directionalization – some 700,000 persons with respect to primary service, and 17,200,000 as to

secondary service – cannot be regarded as of no consequence, even if only a small amount of the station's time is devoted to network programs and there are three other ABC networks.

28. Moreover, in view of the emphasis which the Court placed on equality among the three companies with respect to clear channel facilities, it must also be regarded as significant that both CBS and NBC have more clear channel skywave signals than does ABC in the area which would be lost to WABC by directionalizing to protect KOB at night. According to KOB's exhibits, all of this area has one ABC skywave signal (from WCKY), nearly all of it a second (from ABC-owned WLS), and portions of it receive one or two other ABC skywave signals, from three other stations. All parts of the area receive at least 4 NBC and at least 5 CBS secondary services, ranging up to 10 and 9 such signals respectively.[9] Since several million persons in this area do [45] not have nighttime primary AM service available to them, the loss of one ABC secondary service to this population must be regarded as a significant matter.[10] In sum, we conclude that

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[9]There have been some changes in affiliation of these class I stations since KOB's exhibits were prepared, but the general picture is still the same. Of 37 other class I stations which provide skywave signals to all or part of the skywave coverage area which WABC would lose by directionalizing, as of late 1975 only one (WLS, Chicago, ABC-owned) was an ABC Contemporary outlet; three were affiliated with other ABC networks (KXEL, WBT and WWVA), and one affiliated with both the ABC Information network and with CBS (WCKY). Eight others were affiliated with CBS and 13 with NBC. Eleven had no national network affiliation.

[10]ABC has, among its 4 networks, many more affiliated stations than do CBS or NBC, about 1,400 AM and FM stations

[footnote continued]

these concepts have much the same importance they had in 1965, and in light of the Court's 1965 decision, support the result reached herein.

Decision in the Proceeding

29. The "KOB problem" is perhaps the oldest unresolved matter before the Commission. Our earlier efforts to resolve it have been the object of four appeals to the Courts and three major proceedings before this agency. The public interest now demands that it be brought to a conclusion. While we adhere to the view that there is considerable merit in the concept of assigning class I-B operations in Albuquerque and New York City on 770 kHz, as determined through the hearing process in 1958 and again in 1963, we recognize that this solution would find favor with the Court only if WNBC and WCBS were similarly directionalized. For the reasons we have expressed, such a solution would run counter to the overall objectives of the 1961 Clear Channel Decision. We are not prepared to pay that price. Finally, the introduction of new and improved aural broadcast services into the State of New Mexico over the past 11 years has redressed part of the allocations imbalance on which our earlier decisions turned, and makes a "II-A" status for KOB more acceptable today than in years past. We conclude that this can be done with minimal disruption to KOB's present nighttime listenership, given the RSS limit already imposed by WABC's nondirectional

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compared to roughly 300 for NBC (in two networks) and 250 for CBS, as of early 1976. However, only the clear channel stations referred to in the text and in footnote 9 provide skywave service.

operation on KOB, and that, everything considered, a "II-A" status for KOB will not disserve the public interest.

30. As we noted in paragraph 7, *supra*, KOB has on file an application (BP-13932) for permission to operate a class I-B directionalized station on the 770 kHz assignment occupied by WABC in New York. That application, as the Court recognized in American Broadcasting, *supra*, 345, F. 2d at 957, was responsive to our 1958 Orders that both KOB and WABC should operate as class I-B directionalized stations on their respective 770 kHz assignments. WABC, however, had refused to seek a renewal under those terms, and KOB hoped, by applying, to substitute itself on the channel and thus obviate the protracted controversy between the two stations. We deferred action on the application, and the Court approved, until such time as we should resolve the issue of equal treatment for the New York network "flagship" stations, and the classification for 770 kHz in that city, *Id.* at 961. Now, by our action herein, making KOB a II-A station and returning WABC to I-A status, KOB's application for a I-B assignment in New York is effectively mooted. The larger concern – clear channel protection from co-channel interference – has been resolved in a manner we view as fair, equitable and public-serving. We find no compelling reasons for lengthy consideration of that application, especially in light of the overall circumstances. However, our actions herein cannot be taken as foreclosing future filings by any qualified party who may desire to com[46]pete, at the appropriate time with the proper application, for the 770 kHz assignment now licensed to WABC. Therefore, we are dismissing KOB's application (BP-13932), and granting the WABC renewal application (BR-167).

31. Accordingly, and pursuant to sections 4(i), 303(r), 307(b), and 308(a) of the Communications Act of 1934, as amended, IT IS ORDERED, That the "Petition to Enlarge Scope of Proceedings" filed by WEW and supported by KXA, IS DENIED.

32. IT IS FURTHER ORDERED, That Hubbard's application (File No. BP-13932) to establish a new class I-B station in New York City on 770 kHz IS DISMISSED as inconsistent with the rule amendments herein adopted, which contemplate a I-A clear channel priority on 770 kHz at that location.

33. IT IS FURTHER ORDERED, That Hubbard IS DIRECTED TO TENDER FOR FILING, on or before June 30, 1976, an application to modify its outstanding construction permit (BMP-1738) to specify a nighttime directional pattern and theoretical parameters appropriate to the operation of KOB as a class II-A station.

34. IT IS FURTHER ORDERED, That section 1.1111 of the Commission's rules ARE WAIVED to permit the acceptance and processing of such application without payment of filing and grant fees.

35. IT IS FURTHER ORDERED, That Hubbard's program test authorization of October 25, 1963, IS HEREBY EXTENDED until further order of the Commission.

36. IT IS FURTHER ORDERED, That ABC's application (File No. BR-167; Docket No. 14225) for renewal of the WABC license on 770 kHz IS GRANTED without prejudice to such further action as the Commission may deem appropriate upon the conclusion of proceedings in which American Broadcasting Companies, Inc., is a party defendant: (i) *Columbia Pictures Industries, Inc.*, et al., *v. American Broadcasting Companies, Inc.*, et al. (Civil Action File No. 70 Civ. 4202, United States District Court for the Southern District of New York); (ii) *United States of America v. American Broadcasting Companies, Inc.* (Civil Action File No. 74 Civ. 3600, United States District Court for the Central District of California); and (iii) *Dubuque Communications Corp. v. American Broadcasting Companies, Inc.* (Civil Action File No. 73 Civ. 1473, United States District Court for the Northern District of Illinois, Eastern Division).

37. IT IS FURTHER ORDERED, That effective June 4, 1976, sections 73.22, 73.25 and 73.182 of the Commission's rules ARE AMENDED as set forth in the Appendix.

38. IT IS FURTHER ORDERED, That proceedings in Docket Nos. 6741 and 14225 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

APPENDIX

Part 73 of Chapter 1, Title 47 Code of Federal Regulations, is amended as follows:

1. Section 73.22(a) is amended to read as follows:

§73.22 Assignment of Class II-A stations.

(a) Table of assignments. One Class II-A station may be assigned on each channel listed in the following table within the designated State or States: [47]

Channel (kHz)	Location of existing Class I station	States (s) [SIC] in which Class II-A assignment may be applied for
670	Chicago, Ill.	Idaho.
720	Chicago, Ill.	Nevada or Idaho.
770	New York, N.Y.	New Mexico.
780	Chicago, Ill.	Nevada.
880	New York, N.Y.	North Dakota, South Dakota, or Nebraska.
890	Chicago, Ill.	Utah.
1020	Pittsburgh, Pa.	New Mexico.
1030	Boston, Mass.	Wyoming.
1100	Cleveland, Ohio	Colorado.
1120	St. Louis, Mo.	California or Oregon.
1180	Rochester, N.Y.	Montana.
1210	Philadelphia, Pa	Kansas, Nebraska, or Oklahoma.

* * * *

2. In §73.25, (a)(1) is amended to read as follows and (a)(5) note 3 is deleted, and notes 4, 5 and 6 are redesignated as notes 3, 4 and 5, respectively.

§ §73.25 Clear Channels; Classes I and II Stations.

* * * * *

(a) ***

(1) On 670, 720, 770, 780, 880, 890, 1020, 1030, 1100, 1120, 1180, and 1210 kHz, one class II-A unlimited time station, assigned and located pursuant to the provisions of §73.22.

* * * * *

§73.182 [Amended]

3. Section 73.182(v) is amended by deleting the final sentence in footnote 7.

APPENDIX G

United States Court of Appeals
For The District of Columbia Circuit

No. 76-1476 September Term, 1977

HUBBARD BROADCASTING, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

AMERICAN BROADCASTING COMPANIES, INC.,
Intervenor

No. 76-1477

HUBBARD BROADCASTING, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents

AMERICAN BROADCASTING COMPANIES, INC.,
Intervenor

Appeal From and Petition for Review of Orders of the Federal Communications Commission.

Before: WRIGHT, ROBINSON, and MacKINNON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the Federal Communications Commission and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

This court is in general agreement with the reasons stated in the Commission's Report and Order.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the orders of the Commission are hereby affirmed, and the petition for review and the appeal are hereby denied.

Per Curiam

For the Court

George A. Fisher
Clerk

[Filed September 22, 1977]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-977

HUBBARD BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

Of Counsel:

McKENNA, WILKINSON
& KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 296-1600

JAMES A. McKENNA, JR.
VERNON L. WILKINSON
ROBERT W. COLL

March 22, 1978

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

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OPINIONS BELOW

The opinion of the Court of Appeals is unreported (Pet. App. G). Earlier opinions concerning this same controversy are *American Broadcasting Co.* v. *FCC*, 89 U.S. App. D.C. 298, 191 F.2d 492 (1951); *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 14 RR 2020 (U.S. App. D.C., September 27, 1956); *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 108 U.S.

App. D.C. 83, 280 F.2d 631 (1960); and *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 120 U.S. App. D.C. 264, 345 F.2d 954 (1965), *cert. denied*, 383 U.S. 906 (1966).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(*1*).

QUESTION PRESENTED

Whether the decision of the Federal Communications Commission, establishing KOB as a Class II-A station on Class I-A clear channel 770 KHz, in exactly the same fashion as Class II-A stations have been authorized to operate on eleven other Class I-A clear channels, was arbitrary, capricious and unreasonable under all the circumstances involved in this prolonged controversy.

STATEMENT

The facts surrounding this 37-year old controversy—which was five times before the court below and which this Court refused to review in 1966—may be briefly summarized as follows. In the 1920's, the Federal Radio Commission made provision for three Class I-A stations in New York City.[1] Eventually, the flagship stations

[1] The Commission's allocation of AM frequencies originally contemplated four classes of stations: Class I with up to 50 kw power on the clear channels; Class II also on the clear channels with power up to 50 kw but with service curtailed to protect the dominant Class I stations; Class III on regional frequencies with power up to 5 kw; and Class IV on local frequencies with power of 250 watts (later, 1 kw, day). This case concerns Class I-A stations whose characteristics were, orignally, operation with 50 kw, unlimited time, non-directional, *with no other station operating on the same frequency at night*. Class I-B stations also operated with 50 kw, unlimited time; however, typically *two* such stations occupied

for the emerging three major national radio networks occupied these frequencies—WNBC for NBC's Red Network (660 KHz); WJZ (now WABC) for NBC's Blue Network and later the ABC network (770 KHz); and WCBS for the CBS network (880 KHz). Each station operated with 50 kw, non-directional and no other station operated at night on any of these frequencies in the continental United States.

In 1941, as the result of a treaty, the U.S. lost priorities on certain of its clear channels. KOB, in the resulting reshuffle, was placed on 1030 KHz but subsequently (in October 1941) authorized to operate "temporarily" on 770 KHz (with 50 kw, day, 25 kw, night, non-directional) under a Special Service Authorization limited to three months. Notwithstanding this limitation, KOB, with one mode of operation or another, has operated on 770 KHz ever since.

In 1945, the Commission instituted a rulemaking to consider uses of clear channels generally (Docket 6741) —a proceeding which was to remain intertwined with the "KOB problem." With the Commission vacillating between an *ad hoc* proceeding and the Clear Channel Proceeding to resolve KOB's status, ABC first brought the matter to the court below in 1949.

In 1951, that court ordered the Commission to act "with all deliberate speed" on ABC's complaints of inter-

the same frequency at night, each directionalized to protect the other. In 1961, the Commission, as the result of its Clear Channel rulemaking (Docket 6741), established Class II-A stations—authorized to operate fulltime on the same frequency as the Class I-A station but with the Class II-A station directionalized at night to protect the dominant station which continued to operate non-directionally. See *Goodwill Stations, Inc.* v. *FCC*, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963). No more than one Class II-A station may operate on each of the Class I-A frequencies selected for this use.

ference.[2] When, after five years, the Commission had provided no solution, the court directed the Commission to accord relief within sixty days.[3] KOB was thereupon permitted to remain on 770 KHz but required to directionalize to protect WABC at night.

Thereafter, the Commission decided in 1960 that 770 KHz should be re-classified a I-B frequency—with both KOB and WABC directionalized to protect each other, while the status of WNBC and WCBS (both still unduplicated at night) was left for later determination in the Clear Channel Proceeding (Docket 6741). The court below affirmed that action as a temporary measure, pending final action in the Clear Channel Proceeding with the caveat that the Commission discontinue treating WABC in an inequitable fashion *vis-a-vis* the other two networks.[4]

The Commission subsequently decided the Clear Channel Proceeding and classified the New York CBS and NBC stations, not as I-B stations as had been done with 770 KHz, but as I-A's with single Class II-A directionalized operations permitted on each channel and WCBS and WNBC retained as the Class I-A stations in nondirectional status.[5] The court below reversed again, holding that, in light of its prior decisions, the Commission's continued unequal and inequitable treatment

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[2] *American Broadcasting Co.* v. *FCC*, 89 U.S. App. D.C. at 307, 191 F.2d at 502.

[3] *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 14 RR 2020 (U.S. App. D.C., September 27, 1956).

[4] *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 108 U.S. App. D.C. 83, 280 F.2d 631 (1960).

[5] Similar treatment was afforded eleven other clear channel frequencies.

of WABC as a Class I-B station could not be justified. This Court refused to review that decision.[6]

Upon remand, the Commission re-opened the Clear Channel rulemaking proceeding insofar as it related to 770 KHz (Docket 6741); received comments from the interested parties; and reached the decision of which review is now sought—a decision which classifies KOB as a Class II-A station, directionalized to protect WABC as the Class I-A station, the exact same treatment given the eleven other eastern clear channels.

A unanimous panel of the court of appeals affirmed that decision without opinion. The instant petition for certiorari, which we oppose, followed.

Against this summarized background, we offer the following more detailed statement of this prolonged controversy. The initial encroachment on WABC's rights on 770 KHz occurred in October 1941, when the Commission granted Station KOB, Albuquerque, New Mexico (1030 KHz, 10 kw, U) "special temporary authority" to operate on 770 KHz (50 kw day, 25 kw night) while certain skywave measurements were being taken by the Commission on that and other frequencies—a measurement program interrupted seven weeks later by Pearl Harbor and never thereafter resumed.

Notwithstanding assurances by the Commission, in response to objections interposed by WABC that KOB's operation on 770 KHz was a "temporary" measure, unavoidable in view of the war-time freeze on construction, KOB filed an application in 1944 for a regular license to operate nondirectionally with 50 kw on 770 KHz, accompanied by a petition to "breakdown" 770 KHz to permit two unlimited-time Class I stations thereon.

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[6] *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 120 U.S. App. D.C. 264, 345 F.2d 954 (1965), *cert. denied*, 383 U.S. 906 (1966).

A hearing on KOB's application was held in January 1945, with the hearing issues restricted solely to engineering matters. (Docket 6584).

Some five weeks later (on February 20, 1945), on the ground that the policy questions (engineering, social and economic) involved in applications for the breakdown of clear channels could be more appropriately considered in an overall rulemaking rather than in an *ad hoc* adjudicatory proceeding, the Commission instituted its so-called Clear Channel Proceeding (Docket 6741) and thereafter dismissed all applications then pending for such breakdowns—except the application of KOB, which was placed in the pending file (11 *Fed. Reg.* 12232).

After it became apparent that the Clear Channel Proceeding was not to be promptly resolved, ABC formally objected to the continuing operation of KOB on 770 KHz and the resulting loss of some 23 million listeners caused by KOB's *nondirectional* nighttime operation with 25 kw on 770 KHz. On appeal from the Commission's denial of those objections,[7] the court of appeals in 1951 reversed, on the ground that the pendency of the Clear Channel Proceeding, with no prospect of an immediate decision therein, was not a valid excuse for the prolonged continuation of the interference which KOB was causing WABC. The court made it clear that a *temporary or interim* solution should be found, with all deliberate speed, even though the subsequent conclusions in the Clear Channel Proceeding might thereafter dictate a

[7] See *American Broadcasting Co., Inc.*, 5 RR 1117, 1121 (1949). ABC was there told by the Commission that a final determination with respect to a *permanent* assignment for Station KOB can best be made after a final decision in the Clear Channel Hearing; and that the question of KOB's "permanent assignment . . . cannot be determined until after a decision in the Clear Channel Hearing." Although in accord with those assertions, ABC did object to the Commission's refusal to return KOB *in the interim* to its duly licensed frequency of 1030 KHz.

different result. *American Broadcasting Co.* v. *Federal Communications Commission*, 89 U.S. App. D.C. at 306, 191 F.2d at 501.

Some fourteen months thereafter the Commission removed from its pending files, as a vehicle for a temporary solution thus ordered by the court of appeals, the stale 1945 record. See *Albuquerque Broadcasting Co.*, 8 RR 346 (1952). Almost three years later, on May 26, 1955, the Commission ordered that record updated and expanded to include an engineering showing on 1030 KHz (on which KOB was duly licensed) and data on certain non-engineering matters. *Albuquerque Broadcasting Co.*, 12 RR 583 (1955).[8] From Commission action allowing KOB in the interim to continue its nondirectional nighttime operation on 770 KHz, ABC took a second appeal (Case No. 12,883). The court of appeals on September 27, 1956, directed the Commission within sixty days to "take effective steps substantially to relieve [the present] illegal impingment upon the existing license of Station WABC . . . ." *American Broadcasting-Paramount Theatres, Inc.* v. *Federal Communications Commission*, 14 RR 2020 (U.S. App. D.C. September 27, 1956). Pursuant to that mandate and subsequent Commission orders, KOB directionalized its nighttime operation in April 1957 (770 KHz, 50 kw-D, 25 kw-N, DA-N) to protect ABC's present nondirectional 0.5 mv/m 50% skywave contour.

[8] Throughout the further hearing thus ordered in *1955* in Docket 6584, which culminated in its 1958 decision (25 FCC 683), various requests by ABC to expand the scope of that proceeding to include certain additional Class I-A frequencies and additional non-engineering matters were denied by the Commission on the premise that that proceeding was narrowly limited in purpose (to carry out the 1951 mandate of the court of appeals by finding a *temporary* berth for KOB pending a *permanent* solution of the KOB "problem" in the Clear Channel Proceeding), and should not be allowed to degenerate into a miniature clear channel hearing. *Albuquerque Broadcasting Co.*, 12 RR at 586; *Albuquerque Broadcasting Co.*, 13 RR 861, 868 (1956).

On April 15, 1958, after the record in the further hearing in Docket 6584 had already been closed, but before a decision was announced therein, the Commission reactivated its Clear Channel Proceeding (Docket 6741) —by a Second Notice which proposed to place two Class I-A directionalized operations on several eastern Class I-A channels, and which indicated for the first time that a permanent solution of the WABC-KOB controversy and the use to be made of 770 KHz would be arrived at in Docket 6584 rather than in Docket 6741.

By a Decision and Order, both adopted September 3, 1958, in Docket 6584, (*Albuquerque Broadcasting Co.*, 25 FCC 683; and *Albuquerque Broadcasting Co.*, 25 FCC 805), the Commission concluded, notwithstanding the loss to WABC of some 15 million listeners, that the frequency 770 KHz should be broken down to permit two unlimited time 50 kw *Class I* operations thereon, with each directionalized to protect the other—action in line with the Second Notice of April 1958 in Docket 6741 wherein the Commission had proposed similar action with respect to four other Eastern Class I-A channels (including those licensed to NBC and CBS in New York City). The proceedings in Docket 6584 were ordered "to remain open for the purpose of considering further adjudicatory matters" in connection with permission granted KOB and WABC to submit applications requesting specified directional patterns. (*Albuquerque Broadcasting Co.*, 25 FCC 683 at 794).[9]

From the concurrently issued 1958 Order amending its rules to "permit" two Class I operations on the fre-

[9] With the Clear Channel Proceeding reactivated, the earlier mandates of the court below carried out, and with KOB substantially protecting WABC's 0.5 mv/m 50% skywave contour, ABC urged the Commission, but to no avail, that any further proceedings in Docket 6584 be held in abeyance pending a final decision in the Clear Channel Proceeding.

quency 770 KHz (*Albuquerque Broadcasting Co.*, 25 FCC 805), ABC again appealed. In its brief in those cases, filed in February 1960, ABC complained that it had been prejudiced by being buffeted between the Clear Channel Proceeding (Docket 6741) and the KOB proceeding (Docket 6584) on the matter of the future use to be made of 770 KHz, pointing out (a) that the pendency of each proceeding had in turn been used as an excuse for not considering in either other possible frequencies for KOB and (b) that in September 1958, when the Commission ordered WABC to directionalize and to share its 770 KHz frequency with KOB in Docket 6584 (25 FCC 683), the Commission was proposing (by its Second Notice of April 1958 in Docket 6741) to take identical action in the Clear Channel Proceeding with respect to the flagship operations of NBC and CBS on 660 KHz and 880 KHz in New York, whereas in a Third Notice issued in the Clear Channel Proceeding (Docket 6741) in September 1959, a year after the KOB case had been decided and after it was again on its way to the courts, the Commission had concluded, because of skywave dislocations in the east, to repudiate the dual Class I approach which it had suggested in its Second Notice and not to require NBC, CBS, and various other eastern clears to directionalize their existing operations.[10]

As a result of this buffeting procedure and changes in allocation philosophy, ABC pointed out that it was about to end up with flagship facilities for its radio

[10] Instead of breaking down the clears for two Class I operations each directionalizing to protect the other, the Commission in its Third Notice of 1959 proposed a *Class II* operation on each broken down clear, so directionalized as to protect the present 0.5 mv/m 50% skywave contour of the existing dominant Class I-A station—a mode of operation which ABC was fully prepared to accept on 770 KHz and which it did accept by supporting in the court below the Commission's subsequent Clear Channel decision covering all Class I-A clear channel frequencies other than 770 KHz. *Goodwill Stations, Inc.* v. *FCC, supra.*

network distinctly inferior to those of CBS and NBC, in large part because 770 KHz had been severed from the proceedings in Docket 6741, and because the proceeding in Docket 6584, after the record had been closed, had been transformed from a proceeding to carry out the court's 1951 mandate to find an *interim* solution into a proceeding to determine a permanent facility for KOB.

In its subsequently issued opinion in those cases, the court of appeals made it abundantly clear, even though it there affirmed the Commission's refusal to return KOB to 1030 KHz, that the untoward consequences feared by ABC were not there being sanctioned. *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 108 U.S. App. D.C. at 87-88, 280 F.2d at 635-636. The Commission was there explicitly told that "the position of ABC as a network should not be permanently prejudiced by forcing it to share a channel [in Docket 6584] if other networks [and Eastern clears] are [subsequently] given full use of clear channels [in Docket 6741]." The Commission was further told that it should, in the Clear Channel Proceeding, *sua sponte*, or otherwise, "seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks." The Commission sought no review of that decision or mandate.

Some 14 months thereafter, in advance of the issuance of its Clear Channel Report stating precisely how the Eastern clears were to be broken down, the Commission on July 27, 1961 directed a "further hearing" in Docket 6584 on the question whether the consideration of providing facilities to the ABC network in New York on a basis which is fair and equitable in comparison with other radio networks should vary the conclusion reached in 1958 that WABC should directionalize and share its frequency with KOB.

On September 14, 1961, after a prehearing conference to delineate the scope of the further hearing ordered six weeks earlier in Docket 6584 had been held, the Commission released its Report and Order in the Clear Channel Proceeding, wherein the Commission (a) abandoned the dual Class I approach on all 25 Class I-A channels other than 770 KHz (*Clear Channel Broadcasting*, 31 FCC 565, 574); (b) left NBC's New York frequency (660 KHz) in status quo, with no provision for its duplication in the 48 contiguous states (*Id.* at 576); (c) required the *Class II-A* stations which it authorized in the west on 11 of the 25 Class I-A channels (including CBS's 880 KHz channel) to protect the existing primary and secondary service of each of the dominant Class I-A frequencies, none of which was to be required to directionalize (*Id.* at 577, 604); and despite the fact that a "further hearing" in Docket 6584 had been ordered on that very point only six weeks previously (d) reaffirmed its 1958 KOB decision providing for two Class I directional operations on 770 KHz (*Id.* at 597). From this last-mentioned pronouncement in the Clear Channel Decision, ABC filed a protective petition for review (Case No. 17,567), a petition which at ABC's request was held in abeyance pending the results of the "further hearing" in Docket 6584.

In that "further hearing", after the Commission had refused to expand the issues to include other "Eastern clears" which the court below had mentioned as a possible approach in its May 27, 1960 opinion, ABC adduced uncontradicted engineering evidence showing that the New York flagship stations for each of the three principal radio networks (ABC, CBS, and NBC) presently serve some 42,000,000 persons; that under the Clear Channel Decision (Docket 6741) NBC's and CBS's flagship stations will continue to serve some 42,000,000 persons, whereas WABC's coverage (under the 1958 decision

in Docket 6584) would be reduced to 24,000,000 persons; that the area and population which ABC would thus lose, if WABC directionalized, already receive fewer services from ABC owned or affiliated stations than they receive from CBS and NBC owned or affiliated stations, with the ABC network thus less able to bear coverage losses of that magnitude; that some 850,000 persons who presently receive a primary service from WABC (in some instances within forty miles of New York City) will hereafter be dependent on an intermittent skywave service by a single station (that of WLS in Chicago) for the program service provided by the ABC radio network; and that almost 16,000,000 persons (of whom 5,667,000 are without any primary service) will hereafter be dependent on intermittent skywave service from 0-2 (rather than 1-3) stations for the programs of the ABC radio network, whereas those same people will continue to have from 5-9 and 3-10 skywave services by which to receive the programs of the CBS and NBC radio networks (See *Hubbard Broadcasting, Inc.*, 35 FCC 36 (1963)).

On the record in that hearing and in subsequent pleadings, ABC indicated its willingness, in order to bring the KOB litigation to an end, to acquiesce in a breakdown of 770 KHz and the dual utilization of that frequency in the same fashion as that ordered on 11 of the 25 Class I-A channels in Docket 6741 (namely, the duplication of the eastern clears by a Class II-A station in the west, protecting the existing nondirectional 0.5 mv/m 50% skywave contour of the dominant station).

In a Decision adopted on July 3, 1963, (*Hubbard Broadcasting, Inc.*, 35 FCC 36, 43), the Commission adhered to its 1958 conclusion requiring WABC to directionalize and to forego some 18,000,000 listeners, even though as a result of the Clear Channel Decision both NBC and CBS continue to enjoy "full utilization" of their flagship channels in New York City (35 FCC 36).

It ignored ABC's expressed willingness to acquiesce in a breakdown of 770 KHz (and its utilization by KOB) in a fashion identical with that ordered on eleven Class I-A frequencies in the Clear Channel Decision (*i.e.*, with KOB protecting WABC's present 0.5 mv/m 50% skywave contour).

From action granting KOB Class I-B rights on 770 KHz (770 KHz, 50 kw, U, DA-N) and refusing to renew WABC's long held license for nondirectional operation on 770 KHz in New York City (770 KHz, 50 kw, U), ABC again appealed. In a unanimous decision released February 25, 1965, the court of appeals concluded (1) that the Commission had nowhere adequately explained the disparate treatment of 770 KHz in Docket 6584 and the wholly different action it took on the remaining Class I-A clear channels in Docket 6741, and (2) that the Commission's actions on 770 KHz were violative of the court's 1960 mandate (108 U.S. App. D.C. at 89). The decision and order of the Commission were accordingly remanded for further proceedings. *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 120 U.S. App. D.C. 264, 345 F.2d 954 (1965). Following a denial of a pleading entitled "Motion for Clarification of Mandate", in truth a belated request for reconsideration of both the 1960 and 1965 decisions and mandates of the court of appeals, this Court denied *certiorari*, 383 U.S. 906 (1966). Thereafter, in an Order of April 7, 1966 the Commission directed the parties to submit memoranda setting forth their views as to the manner in which the Court's decision should be implemented. The resulting pleadings revealed unanimity of the parties that no purpose would be served by ordering further adjudicatory proceedings in Docket 6584. There was also unanimity that the proper approach was to put 770 KHz back into the Clear Channel rulemaking (Docket 6741). The Commission took action accordingly, with the precise scope

of the reopened proceeding to be set forth at a later date (*Hubbard Broadcasting, Inc. (KOB)*, 4 FCC 2d 606 (1966)). Thereafter, the frequency 770 KHz was once again included among the clears with Class I-A status (Rule 73.25(a), as amended February 28, 1968, 12 RR 2d 1591, 1593-1594).

In due course, by Notice of Proposed Rulemaking adopted April 22, 1969, and after discussing, at length, the somewhat restricted matters yet to be resolved, the Commission reopened the Clear Channel Proceeding "only" for the purpose of considering comments to amend Rules 73.25(a) and 73.22 "to specify 770 [KHz] as a I-A channel on which a class II-A station in New Mexico (KOB) may be assigned, and whatever counterproposals concerning the mode of operation of KOB, on 770 [KHz] or as a Class I station on another channel, may be presented," in the light of basic considerations there set forth. *Clear Channel Broadcasting*, 17 FCC 2d 257, 275 (1969) (footnote omitted). Comments, reply comments and other pleadings were thereupon filed by ABC and KOB.

On April 30, 1976, the Commission released its decision in the Clear Channel Proceeding, which it had thus reopened (*Clear Channel Broadcasting*, 59 FCC 2d 32). It concluded, with due regard for the prior decisions of the court of appeals, that the public interest would be served by establishing KOB as a Class II-A station on 770 KHz (with WABC operating as the dominant and non-directional station), thus treating 770 KHz in exactly the same fashion as it had earlier decided with respect to 11 other "duplicated" clear channels.

The Commission fully considered and rejected various alternatives.[11] It found that (a) reversion by KOB to its originally licensed frequency of 1030 KHz was unacceptable because of disruptive effects on channel assignments adjacent to 1030 KHz in the western United States; (b) no frequency other than 1030 KHz was reasonably available for nighttime use by KOB in New Mexico; (c) requiring each of the three New York stations to directionalize (thus making them I-B stations) "would result in very extensive losses of service in the densely populated northeastern part of the country, depriving large populations of three skywave services and of three groundwave services in areas west of New York City, where 'white areas' might result if the service of all three stations were lost;" and (d) retention of the current operating mode of KOB (directionalized as a I-B, rather than II-A station, thus intermixing I-A and I-B facilities) represented "a highly inefficient use of the channel, and if allowed to continue might well preclude the assignment of additional western Class II fulltimers on 770 KHz as part of our deliberations in the new Clear Channel proceeding (Docket 20642)." *Id.* at 41. (footnote omitted).

[11] *Clear Channel Broadcasting*, 59 FCC 2d at 40-42.

The Commission affirmatively found that the most efficient mode of operation for KOB would be with II-A parameters, thus returning KOB to essentially the same coverage it had between 1957 and 1963 at the time Hubbard Broadcasting, Inc. acquired the station. The Commission, in addition to referring to the mandate of the court of appeals, pointed to several intervening developments in support of its conclusion, particularly the rapid development of FM service in New Mexico since 1965, as the result of which 25.1% of the state now receives primary FM service and 70% of the state receives secondary FM service. The Commission noted that in the intervening years, FM stations had been established in seven locations within the area which KOB would serve as a I-B but not as a II-A. It also noted acceptance of an application for a second Class II-A station at Roswell,

New Mexico (KSWS) which, when implemented, would provide a first primary AM service to an area of 1,820 square miles with a population of 4,000.[12] Finally, and of particular relevance to the statutory standard requiring "among the several States and communities . . . a fair, efficient, and equitable distribution of radio service. . ." (47 U.S.C. 307(b)), the Commission noted that—with KOB operating as a Class II-A station—the State of New Mexico will be "in a better position than most western states with respect to nighttime duplication privileges on the eastern I-A clear channels." *Clear Channel Broadcasting*, 59 FCC 2d at 43. Specifically, the Commission found that only Nevada and New Mexico, as the result of its decision, will have *two* operating Class II-A stations on eastern clear channels.

The decision also considered, and rejected, KOB's contentions that it should ignore the "equitable channel treatment" of WABC in relation to the other two networks. The Commission noted that, in addition to the emphasis placed by the court below on equal treatment of the three networks, "both CBS and NBC have more clear channel skywave signals than does ABC in that area which would be lost to WABC by directionalizing to protect KOB at night."[13]

The Commission concluded that its decision would equalize competition among the three networks and avoid the net loss to WABC (through directionalization) of some 700,000 persons now receiving primary service and 17,200,000 in the station's secondary service area—losses which would not be sustained by NBC and CBS.[14]

The court of appeals affirmed the decision without opinion. (Pet. App. G).

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[12] *Id.* at 42-43.

[13] *Id.* at 44.

[14] *Id.*

ARGUMENT

The petition does not present any fact or circumstance justifying review by this Court.

1. The Commission's decision—reaffirming action taken in the 1920's that 770 KHz should be utilized in the same fashion as the other eleven eastern clear channels—is not only fully justified by relevant public interest considerations, but is entirely responsive to prior mandates of the court below. KOB's suggestion that it was improper for the Commission to consider, among other matters, ABC's position in relation to CBS and NBC, is simply a request for reconsideration of the 1965 decision of the court below—which that court explicitly refused to revise in response to a "Petition for Clarification of Mandate" and which this Court declined to review.

2. It was also reasonable for the Commission—and well within its expert discretion—to conclude that the losses in groundwave and skywave service to be experienced by WABC, if required to directionalize, were not adequately balanced by the slight gains in service to New Mexico from the operation of KOB as a Class I-B station. This conclusion was rendered more compelling, as the Commission found, because of the additional radio service from the large number of FM assignments in New Mexico since 1965 and the fact that New Mexico, as the result of this decision and the Class II-A application of KSWS, Roswell, on 1020 KHz, becomes one of only two western states with two Class II-A fulltime assignments. The Commission's decision is also fully consistent with those same public interest considerations which led it, in its general Clear Channel Proceedings, to break down eleven eastern clear channels to Class II-A status (with 770 KHz, now twelve), rather than to Class I-B status. Thus, contrary to KOB's contention, the Commission's decision does not contravene the mandate of Section 307(b)

of the Communications Act to provide "among the several States and communities . . . a fair, efficient, and equitable distribution of radio service. . . ."

3. In essence, it is KOB's position that this Court should insist that 770 KHz be reclassified as a Clear I-B channel with or without similar reclassification of the NBC and CBS New York frequencies and of other eastern clear channel frequencies. The Commission gave adequate reasons—emphasizing the substantial loss of service to the populous eastern states which would result—for deciding otherwise. Such substantive revision of an agency decision is not a proper judicial function. As this and other courts have decided, regulatory agency decisions are to be affirmed unless arbitrary, capricious or unreasonable. See *American Power & Light Corp.* v. *SEC*, 329 U.S. 90 (1946); and *American Trucking Association* v. *Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397, *rehearing denied*, 389 U.S. 889 (1967).

4. Finally, this Court should be aware that in its new Clear Channel Proceeding (Docket 20642) the Commission has provided a vehicle for further consideration of public interest requirements in relation to clear channel broadcasting. In that proceeding, KOB, in extensive comments, is again urging the Commission to break down the three New York City channels to I-B status. It would be particularly inappropriate for the judiciary to interpose its substantive rulemaking judgment on a matter now under active consideration and not yet ruled upon by the Commission. See *Hale* v. *FCC*, 138 U.S. App. D.C. 125, 425 F.2d 556 (1970).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

AMERICAN BROADCASTING COMPANIES, INC.

By: _____

JAMES A. MCKENNA, JR.
VERNON L. WILKINSON
ROBERT W. COLL
MCKENNA, WILKINSON & KITTNER
1150 17th Street, N.W.
Washington, D.C. 20036

Its Attorneys

March 22, 1978

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HUBBARD BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN H. SHENEFIELD,
Assistant Attorney General,

ROBERT B. NICHOLSON,
EDWARD E. LAWSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ROBERT R. BRUCE,
General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

JULIAN R. RUSH, JR.,
Counsel,
Federal Communications Commission,
Washington, D.C. 20554.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-977

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 114-115) is not reported. The report and order of the Federal Communications Commission (Pet. App. 82-113) is reported at 59 F.C.C. 2d 32.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1977. The petition for a writ of certiorari was filed on January 6, 1978, in conformity with an enlargement of time granted by the Chief Justice. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 307(b) of the Communications Act, as amended, 49 Stat. 1475, 47 U.S.C. 307(b), is reproduced in Petitioner's Appendix, p.1.

QUESTION PRESENTED

Whether the Federal Communications Commission properly selected WABC over KOB as the primary occupant of clear-channel frequency 770 KHz.

STATEMENT

Petitioner, Hubbard Broadcasting, Inc., is the licensee of radio station KOB in Albuquerque, New Mexico. Since October 1941, KOB has shared the frequency 770 KHz with WABC in New York City, a station licensed to American Broadcasting Companies, Inc. (ABC). The Commission in 1958 amended its rules to permit both stations to operate as full time, maximum power (50 kw) stations, each station being required to protect the other's nighttime signal by the use of directional antennae. *Albuquerque Broadcasting Co. (KOB)*, 25 F.C.C. 683. The effect of this decision, which has never been fully implemented,[1] would have been to enlarge the KOB nighttime service area and to reduce WABC's service area.

WABC, which had previously operated on 770 KHz without a directionalized antenna in keeping with its status as a Class I-A clear channel station,[2] sought judicial

[1]WABC has never used a directionalized antenna.

[2]A clear channel is a frequency specified by the Commission for use by stations which render service over a wide area. 47 C.F.R. 73.21(a). A Class I station is a dominant station operating on a clear channel essentially free from objectionable interference. On some clear channels only one Class I station is permitted to operate; these stations are Class I-A stations. On other clear channels more than one Class I station is permitted, and they must protect each other's signal by using directional antennae; these are Class I-B stations. Class II stations are secondary stations which also operate on clear channels, but must protect Class I stations from interference caused by their operation and are subject to interference from Class I stations. There are three types of Class II stations.

The frequency 770 KHz is one of twenty-five clear channel frequencies on which Class I-A stations are authorized and one of fourteen clear channels on which an unlimited time Class II station may be assigned.

review of the 1958 decision. The court of appeals affirmed, but with reservations. *American Broadcasting—Paramount Theatres, Inc.* v. *Federal Communications Commission*, 280 F. 2d 631 (C.A.D.C.). Noting that the New York City AM radio stations owned by the NBC and CBS networks, WNBC and WCBS, were authorized as Class I-A stations, the court stated its understanding that the Commission would thereafter seek to provide ABC with an AM station facility comparatively equal to those of the CBS and NBC networks. *Id.* at 635-636.

The Commission then began a proceeding concerning the effect of the 1958 decision on ABC's competitive position with respect to the CBS and NBC networks. While this was in progress, the Commission completed its long-standing clear channel rulemaking proceedings, which left intact the status of WCBS and WNBC as Class I-A stations. 31 F.C.C. 565 (1961), affirmed as *Goodwill Stations, Inc.* v. *Federal Communications Commission*, 325 F. 2d 637 (C.A.D.C.).[3] In 1963, the Commission

[3]*Clear Channel Broadcasting*, 31 F.C.C. 565 (1961). The clear channel rules culminated a sixteen year proceeding in which the Commission determined that "breaking down" Class I-A clear channels to permit multiple Class I-B stations on them generally would not result in a better distribution of radio service for the country. A specific proposal of reclassifying all three New York City network stations to Class I-B and authorizing additional Class I-B stations in the West on those frequencies was rejected on the ground it would not result in better radio service to the public. *See* Further

reaffirmed its 1958 decision which had called for both WABC and KOB to be classified I-B stations after determining that WABC's I-B status would not place it at a competitive disadvantage with respect to WCBS and WNBC. *Hubbard Broadcasting, Inc., et al.*, 35 F.C.C. 36.

ABC again sought judicial review, and the court of appeals reversed. *American Broadcasting-Paramount Theatres, Inc.* v. *Federal Communications Commission*, 345 F. 2d 954 (C.A.D.C.). The court held that the Commission had failed to justify its provision to ABC of channel facilities inferior to those of CBS and NBC. *Id.* at 959-960. It stated that the Commission would have to find compelling public interest reasons not yet advanced before it could justify any result which did not authorize facilities for WABC equal to those of WCBS and WNBC. *Id.* at 960.

The Commission sought review in this Court, arguing that the Commission should not be required to ensure comparatively equal radio network facilities, nor make that the touchstone of its decision in this case. The petition for certiorari was denied. *United States, et al.* v. *American Broadcasting-Paramount Theatres, Inc.*, 383 U.S. 906.

On remand the Commission found that new radio services had been authorized in New Mexico since the court of appeals decision in 1965 (Pet. App. 102-104). Although this redressed "part of the allocations imbalance" on which the Commission based its earlier

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Notice of Proposed Rulemaking in Docket No. 6741, 23 Fed. Reg. 2612, 2617 and Third Notice of Further Proposed Rulemaking, 24 Fed. Reg. 7737. Instead, the Commission authorized Class II-A stations on some Class I-A channels as the best method of increasing radio service to the public in its clear channel order.

decision to award KOB Class I-B status, the Commission reiterated its earlier-expressed view that so far as the needs of the Southwest were concerned, there was "considerable merit" in making both KOB and WABC Class I-B operations (Pet. App. 108, 54-55). The Commission, however, recognized that to classify WABC a Class I-B station and at the same time comply with the mandate of the court to give equal treatment to WABC, WCBS, and WNBC would require WCBS and WNBC to be operated as Class I-B stations as well. This would constitute a substantial departure from the conclusions reached in the 1961 clear channel report and order regarding the best method of providing radio service to the public, would involve a loss in existing nighttime service to the public as a whole, would add "further expense, delay and uncertainty," and would not be worth the benefit to the Southwest (Pet. App. 91, 99-100).* Therefore, in conformity with other clear channel "breakdowns," the Commission decided to leave WABC as a Class I-A station and make KOB a Class II-A station (Pet. App. 109).

On appeal, the court below affirmed without an opinion, issuing a judgment in which it announced its "general agreement with the reasons" stated by the Commission (Pet. App. 114-115).

ARGUMENT

The court of appeals' judgment and the Commission's orders which it summarily affirmed are correct and reasonable, do not conflict with other judicial decisions, and do not present an issue of general importance warranting review by this Court.

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*In its order (Pet. App. 82-83), the Commission noted its pending Docket 20642 which is entertaining, among other things, various proposals for further breakdowns of Class I-A channels. Notice of Inquiry and Proposed Rulemaking, 40 Fed. Reg. 58467. Petitioner has filed comments therein advocating its views on dual Class I-B assignments.

1. The Commission's decision is a rational response to the court of appeals' 1965 decision which in effect directed the Commission to treat WABC the same as WCBS and WNBC. The Commission believed that ruling erroneous and sought review in this Court, but the Court declined to hear the case. Thus, the Commission regards the issue of equality of facilities of WABC, WCBS, and WNBC as settled, and the only question presented is whether, given the 1965 court decision, the Commission acted lawfully in the most recent proceeding.

The Commission, in re-examining the KOB/WABC matter after the 1965 remand, recognized that to achieve the result sought by Hubbard and at the same time comply with the 1965 court decision would require a drastic revision of the regulatory framework it had developed after a sixteen year proceeding in its 1961 clear channel rulemaking decision. Therefore, the proceeding was changed from an adjudicatory proceeding between KOB and WABC to a rulemaking proceeding to examine the larger issue of whether the public interest would benefit from a major change in the clear channel rules.[4]

The rules promulgated in the 1961 clear channel decision retained Class I-A stations in their existing status in order to provide the greatest possible nighttime radio service to the United States.[5] Although the Commission in that proceeding considered "breaking down" these clear

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[4]Memorandum Opinion and Order, 4 F.C.C. 2d 606 (1966). The matter was transferred to Docket No. 6741, and that docket, the clear channel proceeding, reopened. Hubbard and ABC had both indicated a preference for this procedure.

[5]Class II-A stations were authorized on some Class I-A channels. *Supra*, n. 2.

channels to permit several Class I-B stations on each channel, it concluded that this would cause serious losses in radio service which can be provided only by Class I-A stations. 31 F.C.C. 565, 574. Indeed, the Commission considered and rejected the course of reducing all three New York network flagship stations to I-B status (see note 3, *supra*).

The Commission in the order under review did take another look at the question of reducing WABC, WCBS and WNBC to I-B stations (Pet. App. 99). After examining the question, however, it found, as it had in 1961, that the cost of such action in terms of loss of service nationwide was simply too high (Pet. App. 100).

As the Report and Order demonstrates, the Commission carefully evaluated the viable alternatives and selected what in its reasoned judgment was the best solution to provide the nation with the most efficient distribution of radio service.[6] The decision required resolution of technical questions and broad policy issues involving a difficult balancing of interests, matters delegated to the reasoned discretion and expert judgment of the Commission by Congress. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236. The result, reached after careful analysis, cannot, we submit, be characterized as an abuse of discretion. The Commission's decision is reasoned and its basis articulated.

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[6]Although the Commission considered four alternatives which would provide equal facilities to WABC, WCBS, and WNBC, only two, making KOB a Class II-A station and breaking down WABC, WCBS, and WNBC to Class I-B, were technically feasible. The alternatives were: (1) assigning KOB to 1030 KHz, (2) assigning KOB to a clear channel other than 770 KHz or 1030 KHz, (3) breaking down WABC, WCBS, and WNBC to Class I-B stations, and (4) intermixing Class I-A and I-B facilities on 770 KHz (Pet. App. 98-100).

2. Hubbard's assertion (Pet. 15) that the Commission's order conflicts with this Court's opinion in *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 361, is unsound. In *Allentown*, an adjudicatory proceeding involving mutually exclusive applicants for an AM broadcast license in separate cities, the Court held that the Commission had acted within its discretion under Section 307(b) of the Act in awarding the license to the applicant who would bring competitive service to the smaller community. Since the case is based on the permissibility of the Commission's choice of policy under Section 307(b), there is no conflict with the decision below, which represents another policy choice, and one hedged by court order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General.

JOHN H. SHENEFIELD,
Assistant Attorney General.

ROBERT B. NICHOLSON,
EDWARD E. LAWSON,
Attorneys.

ROBERT R. BRUCE,
General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

JULIAN R. RUSH, JR.,
Counsel,
Federal Communications Commission.

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PETITIONER'S REPLY

MELVIN H. SIEGEL
LEONARD, STREET AND DEINARD
1200 National City Bank Building
Minneapolis, Minn. 55402

FRANK U. FLETCHER
EDWARD F. KENEHAN
FLETCHER, HEALD, KENEHAN & HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Attorneys for Petitioner Hubbard Broadcasting, Inc.

Washington, D.C. • THIEL PRESS • (202) 638-4521

Petition for Writ of Certiorari filed January 6, 1978.

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PETITIONER'S REPLY

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1. The Federal Respondents' arguments rest on the mistaken premise that the requirement of equal network facilities, though "erroneous", was "settled" when this court declined to review the court of appeals' 1965 decision. Fed. Resp. Br. 6.[1] But the 1965 decision held only that "compelling public interest reasons must be given for not giving equitable channel treatment to WABC". 345 F.2d at 960. It nowhere considered whether the now unquestioned Congressional purpose in enacting Section

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[1] The Brief in Opposition of the Federal Respondents is herein stated as "Fed. Resp. Br. _____", that of Respondent American Broadcasting Companies, Inc., "ABC Br. _____", while the Petition is cited as "Pet. _____".

307(b) would be a sufficiently compelling reason if, as the Commission subsequently found in the proceeding under review, (a) the present needs of the Southwest for initial primary service remained essentially unchanged since the Commission's 1958 decision giving Class I-B status to both KOB and WABC and (b) placing all three New York network stations in the same status was not a viable alternative. On these findings, the Commission was thus not foreclosed from concluding (a) that the Congressional mandate warranted granting I-B status to both KOB and WABC, thereby extending an initial primary service to more than 100,000 people in the Southwest without loss of any such primary service elsewhere (Pet. 6-7), and (b) that granting Class I-A status to WABC, while it would give ABC equality of network facilities, would at most add an additional service to the densely populated areas in the East already adequately served at the cost of a substantial loss of needed initial primary service in the "sparsely populated" areas of the Southwest.

At most the court of appeals' 1965 decision required that, if the Commission subsequently found—as it did—that the needs of the Southwest remained substantially unchanged, then the Commission should grant ABC a "hearing" on whether the NBC and CBS stations in New York should also be given the same status (345 F.2d at 960), as the court of appeals had directed in its prior 1960 decision. 280 F.2d at 636. The Commission did give ABC a hearing but rejected this alternative means of equalizing network facilities as involving too high a price in loss of service in the East. App. 99-100. As already noted, however, in so doing the Commission simply reversed the priorities dictated by Congress in enacting Section 307(b). Pet. 13.

Thus, the new requirement of equality of network facilities was not "settled" by the court of appeals until it affirmed the Commission's Order now under review. The issue is thus now squarely presented for the first time whether the avowed Congressional purpose in enacting Section 307(b) to assure adequate service to the "sparsely populated" areas in the Southwest and elsewhere must yield to a requirement of equality in network facilities in the densely populated areas of the East. This is a question of manifest importance, as the Federal Respondents nowhere dispute.[2]

It need only be added that the principal ground asserted in this petition, the compelling legislative history of Section 307(b), was not even mentioned in the Federal Respondents' petition to review the court of appeals' 1965 decision. That petition, which this Court denied, sought only to leave to the Commission's discretion the weight to be given equality of network facilities. It nowhere requested this Court to enforce the mandate of Congress as revealed in the legislative history of Section 307(b).

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[2] Additional related claims made by the Respondent American Broadcasting Companies, Inc., (ABC Br. 17) hardly rise to the dignity of an argument. The Commission did find that a new Class II-A station had been authorized in New Mexico but would provide a first primary service to only 4,000 persons (App. 103) as compared with the more than 100,000 persons who would receive initial primary service from KOB as a Class I-B station but not as a Class II-A station. The second Class II-A station mentioned by the Commission was KOB itself if it were so reclassified (App. 103-04) but with the stated loss of initial primary service as a Class I-B station. Finally, the Commission did find (App. 103) that seven new FM stations were now located in the area which KOB would serve as a I-B station but not as a II-A station. The Commission, however, did not even mention the number of people thus served—quite possibly because the Commission was well aware, as the record below will show, that any first primary service rendered by the seven new FM stations would be trifling in amount.

2. It may be true that the previously established test for applying Section 307(b) was approved by this Court in *Federal Communications Commission v. Allentown Broadcasting Corporation*, 349 U.S. 361 (1955), as one within the Commission's "discretion", as the Federal Respondents assert. Fed. Resp. Br. 8. But that test was a proper exercise of such discretion because it furthered "Section 307(b)'s emphasis on wide dispersion of radio transmission service". *Pasadena Broadcasting Co. v. Federal Communications Commission*, 555 F.2d 1046, 1050 (D.C. Cir., 1977). The Federal Respondents frankly admit that the Commission has now adopted "another policy". Fed. Resp. Br. 8. This new policy, however, unlawfully defeats the "emphasis" of Section 307(b) by requiring that priority be given to equality of network facilities in major population centers. Pet. 12, 14.

Respectfully submitted,

MELVIN H. SIEGEL
LEONARD, STREET
AND DEINARD
1200 National City
Bank Building
Minneapolis, Minn. 55402

FRANK U. FLETCHER
EDWARD F. KENEHAN
FLETCHER, HEALD, KENEHAN
& HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Attorneys for Petitioner
Hubbard Broadcasting, Inc.